

*Trump's Legacy: The Long-term Risks to American Democracy**

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Introduction

Many Americans saw Donald Trump's 2016 successful presidential bid as an anomaly, the result of several unlikely factors coalescing in his favor.¹ Prior to the 2020 election, several prominent Republicans and traditional conservatives announced their opposition to Trump.² They saw him as a radical departure from mainstream Republicanism.³ Their views fed a narrative: Trump's contempt for political norms would be short-lived, ending with his defeat on November 3.⁴ Because so many Americans saw him as a threat to democracy, one could hear a

¹ For example, Hillary Clinton's unfavorable rulings were extremely high. Add to that Russian interference with the election; James Comey's questionable letter about the continued investigation into Clinton's use of her personal email server; and the inequities produced by the Electoral College. *See, e.g.,* Nate Silver, *The Comey Letter Probably Cost Clinton the Election*, FIVETHIRTYEIGHT (May 3, 2017), <https://fivethirtyeight.com/features/the-comey-letter-probably-cost-clinton-the-election/>.

² For example, many Republicans active in previous campaigns and administrations formed the Lincoln Project for the stated purpose of making Trump a one term president. *See, e.g.,* Jane Coaston, *The Lincoln Project, The Rogue Former Republicans Trying to Take Down Trump, Explained*, VOX (Jul. 17, 2020, 8:10 AM EDT), <https://www.vox.com/2020/7/17/21316641/trump-lincoln-project-gop-2020>. Others, including prominent Republicans Max Boot, George Will, David Brooks, and Mitt Romney also refused to support Trump in the 2020 election. *See, e.g.,* Jacob Knutson & Rashaan Ayesh, *The Top Republicans Who Aren't Voting for Trump in 2020*, AXIOS, <https://www.axios.com/republicans-not-voting-for-trump-in-2020-9e2f02fa-0f36-418d-bedded53181dd99c.html> (last visited Dec. 31, 2020); Annie Karni, *The Crowded, Competitive World of Anti-Trump G.O.P. Groups*, NY Times (Oct. 12, 2020), <https://www.nytimes.com/2020/10/12/us/politics/never-trump-republicans.html>.

³ *See* Knutson & Ayesh, *supra* note 2; Karni, *supra* note 2.

⁴ *Id.*; *see also* Edward-Isaac Dove, *She Wanted to be a Republican President. She's Voting for Biden.*, THE ATLANTIC (Jun. 25, 2020), <https://www.theatlantic.com/politics/archive/2020/06/carly-florina-vote-biden/613474/>; Stephen Collinson, *Trump's Legal Absurdities Force More Republicans to Speak Out*, CNN (Nov. 23, 2020, 10:04 AM), <https://www.cnn.com/2020/11/23/politics/donald-trump-republicans-transition/index.html>; Matthew Walther, *Republicans Are Thrilled to Lose*, THE WEEK (Oct. 24, 2020), <https://theweek.com/articles/945592/republicans-are-thrilled-lose>; Richard Luscombe, *Republicans Express Fears Donald Trump Will Lose Presidential Election*, THE GUARDIAN (Oct. 11, 2020, 3:10 ET), <https://www.theguardian.com/us-news/2020/oct/10/republicans-presidential-election-fears-biden-trump>.

collective sigh of relief when he lost in November.⁵ For many Americans, the election proved the viability of our institutions and the restoration of our democracy.⁶

Much of that narrative is false. No doubt, Trump was extreme in his contempt for political and legal norms.⁷ However, as some commentators have recognized, Trump's presidency was consistent with the direction of the Republican Party over the past several decades.⁸ The party is no longer conservative in any traditional meaning of that term.⁹ Instead, it is dominated by ultra-rightwing libertarians, especially plutocrats.¹⁰

The shift to the far right is especially troubling. The views of the Republican Party do not reflect majoritarian sentiment on almost every major policy position of that party.¹¹ Further, the shift to the right will not end with Trump's failure to achieve a second term. Instead, strategies that Trump and other Republicans have put in place, along with institutional aspects of

⁵ See Nicole Lafond & Cristina Cabrera, *Jubilance In The Streets: America Erupts In Celebration After Trump's Loss*, TPM (Nov. 7, 2020), <https://talkingpointsmemo.com/news/jubilance-streets-america-erupts-celebration-trump-loss>; Zack Budryk, *Americans Happier About Trump Loss than Biden Win: Poll*, THE HILL (Nov. 18, 2020, 11:43 AM ET), <https://thehill.com/homenews/campaign-polls/526498-americans-happier-about-trump-loss-than-biden-win-poll>; Frank Pallotta, *Late-Night TV Celebrates Trump Losing the 2020 Election*, CNN (Nov. 10, 2020, 10:22 AM ET), <https://www.cnn.com/2020/11/10/media/late-night-election-trump-colbert-kimmel/index.html>.

⁶ *Id.*

⁷ *Infra.*

⁸ See Sahil Chinoy, *What Happened to America's Political Center of Gravity?*, NY TIMES (Jun. 26, 2019), <https://www.nytimes.com/interactive/2019/06/26/opinion/sunday/republican-platform-far-right.html>; *International Study Finds US Republican Party Heading Towards Becoming One of World's Most Authoritarian Factions*, COMMON DREAMS (Oct. 26, 2020), <https://www.commondreams.org/news/2020/10/26/international-study-finds-us-republican-party-heading-towards-becoming-one-worlds>; Matthew Rozsa, *How Did the Republican Party Become So Conservative?*, SALON.COM (Jul. 5, 2019, 9:05 AM UTC), <https://www.salon.com/2019/07/05/how-did-the-republican-party-become-so-conservative/>; Christopher Ingraham, *This Astonishing Chart Shows How Republicans Are an Endangered Species*, WASHINGTON POST (Jun. 2, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/02/this-astonishing-chart-shows-how-republicans-are-an-endangered-species/>.

⁹ *Id.*

¹⁰ See, e.g., JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS (2020). Throughout this article, I use the term rightwing libertarian or plutocrat, rather than conservative. Too many commentators, among others, fail to make that distinction. As developed in this paper, traditional conservatives wanted small, but good, government. They believe in institutions of government. Often, Congress was able to forge consensus when conservatives and liberals compromised over legislation. The hard turn to the right is part of why such compromise is seldom achievable.

¹¹ *Infra.*

America’s “democracy,”¹² will allow a party dominated by a shrinking minority of wealthy white Americans to maintain control inconsistent with their percentage in the electorate.¹³

Surely, observers must think it odd that this distinctly minority party has so much power. For example, between 2016 and 2018, Republicans controlled the Presidency, both houses of Congress, and the Supreme Court.¹⁴ The explanation for part of Republican power is well-known: the unholy compromise that helped form the union gave small states outsized power over the Senate.¹⁵ Other reasons for the Republican’s hold on to power are less visible. This paper explores some of those reasons.¹⁶ Importantly, though, many Americans fail to see what is happening in plain sight. Many swing voters who pride themselves for their independence believe the common trope: sure, the Republican Party has moved to the right, but the Democratic Party has moved to the left.¹⁷ The trope is only partly true: yes, the Republican Party has moved

¹² Notably, the Electoral College has resulted in George W. Bush and Trump’s elections despite their loss of the popular vote. Especially under Mitch McConnell’s leadership, the Senate’s anti-democratic structure has added to the power of the plutocratic elites. Of course, the combined effect of Bush and Trump’s victories and Republican’s domination in the Senate has resulted in the Supreme Court’s hard turn to the right.

¹³ *Infra*.

¹⁴ Sarah Frostenson, *Republicans Now Control the Presidency, the Senate, and the House*, VOX (Nov. 9, 2016, 9:00 AM EST), <https://www.vox.com/presidential-election/2016/11/9/13572972/republicans-control-presidency-senate-house>; Tom Murse, *The Political Makeup of Congress*, THOUGHTCO, <https://www.thoughtco.com/the-political-makeup-of-congress-3368266> (last visited Dec. 31, 2020); *Composition of Congress, by Political Party, 1855-2017*, INFO PLEASE, <https://www.infoplease.com/us/government/legislative-branch/composition-of-congress-by-political-party-1855-2017> (last visited Dec. 31, 2020); Lee Epstein, *The U.S. Supreme Court Justices Database*, Washington University St. Louis, <http://epstein.wustl.edu/research/justicesdata.html> (last visited Dec. 31, 2020).

¹⁵ James Rutledge Roesch, *John C. Calhoun and “State’s Rights”*, ABBEVILLE INSTITUTE (Aug. 25, 2015), <https://www.abbeyvilleinstitute.org/review/john-c-calhoun-and-states-rights/>; Robert Longley, *Understanding States’ Rights and the 10th Amendment*, THOUGHTCO (Jul. 3, 2019), <https://www.thoughtco.com/states-rights-4582633>.

¹⁶ *Infra*. In discussion of the trope: why Democrats cannot move off center too far, see Ezra Klein, *Why Democrats Still Have to Appeal to the Center, but Republicans Don’t*, NY TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/opinion/sunday/democrats-republicans-polarization.html>.

¹⁷ See, e.g., Emily Stewart, *Undecided Voters Explain Themselves*, VOX (Oct. 23, 2020), <https://www.vox.com/21528722/undecided-voters-2020-election-trump-biden>; see also Marc Fisher, Christine Spolar & Amy B Wang, *The Undecideds: Sure, Biden and Trump Are Very Different. But Maybe Neither is Right for the Job.*, WASHINGTON POST (Sept. 28, 2020, 2:00AM), https://www.washingtonpost.com/politics/undecided-voters-2020-presidential-debates/2020/09/27/0911c650-fd9e-11ea-8d05-9beaaa91c71f_story.html.

far to the right, well out of mainstream popular sentiment.¹⁸ However, the Democratic Party, on issue after issue, is much closer to strong majoritarian sentiment.¹⁹

Part I reviews briefly Trump and his administration's contempt for political norms.²⁰ It discusses how that contempt has led many prominent Republicans, almost all no longer in government, to abandon their support for his presidency.²¹ Part II explores the Republican Party's hard turn to the far right.²² It also deconstructs the trope that the Democratic Party has moved to the left by examining public opinion polling.²³ That examination demonstrates that the Democratic Party on most major policy questions is closer to majoritarian sentiment than is the Republican Party.²⁴ Part III turns to how Republicans' willingness to abandon specific political norms has been able to hold on to power greater than one would expect, given that it is the distinct minority party.²⁵ Notably, even before Trump, the Republicans ensured the federal courts' hard shift to the right, a trend that is likely to continue erosion of democracy well into the future.²⁶ Part IV examines whether the sharp trend to the right might slow and the continuing risk to our democracy.²⁷

Part I: Abandoning Political Norms

(a) A Trump Sampler

¹⁸ Sahil Chinoy, *What Happened to America's Political Center of Gravity?*, NY TIMES (Jun. 26, 2019), <https://www.nytimes.com/interactive/2019/06/26/opinion/sunday/republican-platform-far-right.html>.

¹⁹ Lane Kenworthy, *The Democratic Party Has Moved Left — But So Has the U.S. This Explains How and Why.*, WASHINGTON POST (Nov. 28, 2019, 3:00 AM), <https://www.washingtonpost.com/politics/2019/11/28/democratic-party-has-moved-left-so-has-us-this-explains-how-why/>.

²⁰ *Infra* Part I.

²¹ *Id.*

²² *Infra* Part II.

²³ *Id.*

²⁴ *Id.*

²⁵ *Infra* Part III.

²⁶ *Id.*

²⁷ *Infra* Part IV.

Trump's abandonment of political and legal norms was almost beyond belief. His outrageous statements, often flagrant lies, kept fact checkers busy.²⁸ Worse, he was able to distract members of the public from one scandal by changing the subject.²⁹ Observers became exhausted, giving Trump an advantage, because they could not keep up with the outrage du jour.³⁰

Trump's counselor Kellyanne Conway popularized the idea of "alternative facts," early in Trump's administration.³¹ Picking up on that theme, Trump targeted the mainstream media.³² His constant charge about "fake news" allowed his supporters to ignore serious challenges to his

²⁸ *Person: Donald Trump*, FACTCHECK.ORG, <https://www.factcheck.org/person/donald-trump/> (last visited Dec. 31, 2020); In 1,372 Days, *President Trump Has Made 26,548 False or Misleading Claims*, WASHINGTON POST (Oct. 22, 2020), <https://www.washingtonpost.com/graphics/politics/trump-claims-database/>; David Markowitz, *Trump Is Lying More Than Ever: Just Look At The Data*, FORBES (May 5, 2020, 7:00 AM EDT), <https://www.forbes.com/sites/davidmarkowitz/2020/05/05/trump-is-lying-more-than-ever-just-look-at-the-data/?sh=38cd99991e17>; George Packer, *A Political Obituary for Donald Trump*, THE ATLANTIC (Dec. 9, 2020), <https://www.theatlantic.com/magazine/archive/2021/01/the-legacy-of-donald-trump/617255/>; *President Trump Has Made More Than 20,000 False or Misleading Claims*, WASHINGTON POST (Jul. 13, 2020), <https://www.washingtonpost.com/politics/2020/07/13/president-trump-has-made-more-than-20000-false-or-misleading-claims/>.

²⁹ See e.g., *No, Over There! Our Case-by-Case Guide to the Trump Distraction Technique*, THE GUARDIAN (Mar. 21, 2017), <https://www.theguardian.com/us-news/2017/mar/21/donald-trump-distraction-technique-media>; Susan Milligan, *Trump's Strategy: Distract, Divert, Repeat*, US NEWS (Aug. 9, 2019, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2019-08-09/president-trumps-distraction-strategy-could-be-fraying>; *Opinion: Trump's Tweets Are a Distraction for Something He Doesn't Want Us to See*, WASHINGTON POST (Jul. 16, 2019), https://www.washingtonpost.com/opinions/trumps-tweets-are-a-distraction-for-something-else-he-doesnt-want-us-to-see/2019/07/16/4274a34c-a811-11e9-9214-246e594de5d5_story.html; *Donald Trump's Fake Scandal Distracts from Real*, SF CHRONICLE (Mar. 20, 2017), <https://www.sfchronicle.com/opinion/editorials/article/Donald-Trump-s-fake-scandal-distracts-from-real-11015600.php>; *Everything is a Distraction from Something Much, Much Worse*, WASHINGTON POST (Jul. 13, 2017), https://www.washingtonpost.com/opinions/everything-is-a-distraction-from-something-much-much-worse/2017/07/13/a42384e0-6809-11e7-a1d7-9a32c91c6f40_story.html.

³⁰ *Id.*

³¹ Rebecca Sinderbrand, *How Kellyanne Conway Ushered in the Era of Alternative Facts*, WASHINGTON POST (Jan. 22, 2017, 8:44 AM PST), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/how-kellyanne-conway-ushered-in-the-era-of-alternative-facts/>; Justin Green, *Today's Top Quote: Kellyanne On "Alternative Facts"*, AXIOS (Jan. 22, 2017), <https://www.axios.com/todays-top-quote-kellyanne-on-alternative-facts-1513300040-0d8272b0-3610-46d5-98eb-ddca6ae5dba7.html>.

³² Anurag Mehra, *Webs of Deceit: Alternative Facts, False Narratives and Toxic Politics*, MEDIUM (Dec. 18, 2019), <https://medium.com/technology-culture-and-politics/webs-of-deceit-manufacturing-culture-with-alternative-facts-acb4e72a883a>; Paul McGeough, *Alternative Facts, Fake News and Trump's War on Mainstream Media*, SYDNEY HERALD TIMES, available at: <https://medicalexposedownloads.com/PDF/Alternative%20facts,%20fake%20news%20and%20Trump's%20war%20on%20mainstream%20media.pdf>.

administration.³³ While other presidents challenged media representatives on occasion, none made a wholesale effort to erode confidence in the mainstream media as did Trump.³⁴

When COVID-19 cases first started appearing in the United States, Trump's unwillingness to accept scientific consensus about the need for swift action contributed to the pandemic.³⁵ His inconsistent and dangerous statements about COVID-19 resulted in unnecessary deaths.³⁶ His followers mindlessly scorned the use of masks.³⁷ Many of his supporters contended that, based on Trump's statements, the media overstated the extent and risk of the virus.³⁸ Again,

³³ *With 'Fake News,' Trump Moves from Alternative Facts To Alternative Language*, NPR (Feb. 17, 2017), <https://www.npr.org/2017/02/17/515630467/with-fake-news-trump-moves-from-alternative-facts-to-alternative-language>; Eugene Kiely, *Trump's Phony 'Fake News' Claims*, FACTCHECK.ORG (Jan. 16, 2018), <https://www.factcheck.org/2018/01/trumps-phony-fake-news-claims/>; Sandra Upson, *Distraction Is Actually Ruining This Country*, WIRED (Jan. 27, 2017, 12:00 AM), <https://www.wired.com/2017/01/distraction-is-actually-ruining-this-country/>; Tom Fiedler, *Trump vs. The Media: The War Over Facts*, CHRISTIAN SCIENCE MONITOR (Mar. 11, 2017), <https://www.csmonitor.com/USA/Politics/2017/0311/Trump-vs.-the-media-the-war-over-facts>.

³⁴ *Id.*; see also, Ryan Mattimore, *Presidential Feuds With the Media Are Nothing New*, HISTORY.COM (Sept. 3, 2018), <https://www.history.com/news/presidents-relationship-with-press>; D.C. McAllister, *Sorry, Journalists: Trump Isn't The First President To Threaten The Press*, THE FEDERALIST (Jan. 24, 2017).

³⁵ Daniel Dale & Tara Subramaniam, *Trump Made 33 False Claims About the Coronavirus Crisis in the First Two Weeks of March*, CNN (Mar. 22, 2020, 6:59 PM ET), <https://www.cnn.com/2020/03/22/politics/fact-check-trump-coronavirus-false-claims-march/index.html>; Matthew Rozsa, *The Science is Clear: Trump Bungled the Pandemic Response*, SALON.COM (Jun. 3, 2020, 11:00 PM UTC), <https://www.salon.com/2020/06/03/the-science-is-clear-trump-bungled-the-pandemic-response/>; Stephen Collinson, *Trump's Outrageous Refusal to Lead is Making the Pandemic Worse*, CNN (Jul. 17, 2020), <https://edition.cnn.com/2020/07/17/politics/donald-trump-leadership-coronavirus/index.html>; Joseph Gerth, *Mitch McConnell Admits that Trump Mishandled Coronavirus Response*, COURIER JOURNAL (Apr. 1, 2020, 9:41 AM ET), <https://www.courier-journal.com/story/news/local/joseph-gerth/2020/03/31/mitch-mcconnell-admits-trump-mishandled-coronavirus-pandemic/5095995002/>; David Remnick, *Trump, Truth, and the Mishandling of Coronavirus*, THE NEW YORKER (Mar. 15, 2020), <https://www.newyorker.com/news/daily-comment/trump-truth-and-the-mishandling-of-the-coronavirus-crisis>; Neil Baron, *Trump is Culpable for Impacts of Coronavirus*, THE HILL (Mar. 13, 2020, 11:30 AM EDT), <https://thehill.com/opinion/white-house/487401-trump-is-culpable-for-impacts-of-coronavirus>.

³⁶ *Id.*; see also Justine Coleman, *Trump on Coronavirus Death Toll: 'It Is What It Is'*, MSN (Aug. 4, 2020), <https://www.msn.com/en-us/news/politics/trump-on-coronavirus-death-toll-it-is-what-it-is/ar-BB17ydn3>; Katelyn Burns, *Trump's 7 Worst Statements on the Coronavirus Outbreak*, VOX (Mar 13, 2020, 8:20 AM EDT), <https://www.vox.com/policy-and-politics/2020/3/13/21176535/trumps-worst-statements-coronavirus>; Christian Paz, *All the President's Lies About the Coronavirus*, THE ATLANTIC (Nov. 2, 2020), <https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/>; David Leonhardt, *A Complete List of Trump's Attempts to Play Down Coronavirus*, NY TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html>.

³⁷ Amanda Marcotte, *Trump's War on Masks: It's working — At Least with His Base*, SALON.COM (May 18, 2020, 5:00 PM UTC), <https://www.salon.com/2020/05/18/trumps-war-on-masks-its-working--at-least-with-his-base/>.

³⁸ See e.g., William Saletan, *The Trump Pandemic: A Blow-by-Blow Account of How the President Killed Thousands of Americans*, SLATE (Aug. 9, 2020, 7:00PM), <https://slate.com/news-and-politics/2020/08/trump-coronavirus-deaths-timeline.html>; see also Michael Riordan, *The Human Cost of the Trump Pandemic Response? More Than 100,000 Unnecessary Deaths.*, THE BULLETIN (Sept. 30, 2020), <https://thebulletin.org/2020/09/the->

almost certainly, that kind of irresponsibility led to the unnecessary spread of the disease.³⁹ In May 2020, conservative opinion writer David Brooks summarized Trump's failure to lead when the nation first faced the pandemic: there, Brooks asked what would America's experience of the pandemic have been if we had a real leader?⁴⁰

Trump demonstrated a similar scorn for traditional political allies. Early and often, Trump attacked NATO and allies within NATO.⁴¹ He made wild and often false claims about allies.⁴² He threatened to dismantle an organization that has contributed to international stability for over 70 years.⁴³ Beyond the war of words, he ordered the withdrawal of 12,000 troops from Germany, one of our closest allies and a bulwark of the European Union economy.⁴⁴ Repeatedly,

human-cost-of-the-trump-pandemic-response-more-than-100000-unnecessary-deaths/; Elie Mystal, *The Deaths of 150,000 Americans Are on Trump's Hands*, *The Nation* (Aug. 3, 2020), <https://www.thenation.com/article/society/coronavirus-trump-crimes/>.

³⁹ *Supra*.

⁴⁰ David Brooks, *If We Had a Real Leader*, *NY TIMES* (May 28, 2020), <https://www.nytimes.com/2020/05/28/opinion/coronavirus-trump.html>.

⁴¹ Megan McGee, *Europe Needs to Push Back Against Trump*, *FP.COM* (Jul. 10, 2020, 1:48 PM), <https://foreignpolicy.com/2020/07/10/trump-europe-nato-transatlantic-push-back/>; Aaron Rugar, *Trump Attacks NATO at NATO Summit, Abruptly Demands Allies Increase Military Spending*, *THINKPROGRESS.ORG* (Jul. 11, 2018, 2:20 PM), <https://archive.thinkprogress.org/trump-attacks-nato-from-nato-summit-military-spending-demands-521838ef5ba3/>; Paul D. Shinkman, *Trump Attacks France, Germany While Praising Turkey at NATO Summit*, *U.S. NEWS* (Dec. 3, 2019, 10:40 AM), <https://www.usnews.com/news/world-report/articles/2019-12-03/trump-attacks-france-germany-while-praising-turkey-at-nato-summit>; Ryan Browne, *Trump Administration to Cut its Financial Contribution to NATO*, *CNN* (Nov. 28, 2019, 3:11 AM EST), <https://www.cnn.com/2019/11/27/politics/trump-nato-contribution-nato/index.html>.

⁴² Nicholas Burns, *Trump Violates Diplomacy's Golden Rule*, *THE ATLANTIC* (Dec. 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/at-nato-summit-trump-abuses-americas-closest-friends/602959/>; Alex Woodward, *Trump Rages Against Nato Allies During Coronavirus Briefing*, *INDEPENDENT* (Mar. 25, 2020, 6:32 PM), <https://www.independent.co.uk/news/world/americas/us-politics/trump-coronavirus-speech-today-nato-funding-white-house-a9426501.html>; Nic Robertson, *Leaders Learn the Hard Way That Trump Will Be Trump at NATO Meeting*, *CNN* (Dec. 5, 2019), <https://www.cnn.com/2019/12/05/politics/trump-nato-analysis/index.html>. For a nonexhaustive list of allies with whom Trump threatened relationships, see: Tal Axelrod, *Here Are the US Allies That Have Been Caught in Trump's Crosshairs*, *The Hill* (Aug. 24, 2019, 12:20 PM EDT), <https://thehill.com/policy/international/458455-here-are-the-us-allies-that-have-been-in-trumps-crosshairs>.

⁴³ Charlotte McDonald-Gibson, *Trump Is Trying to Dismantle the World Order. Is NATO Next on His List?*, *TIME* (Jun. 22, 2018, 11:44 AM ET), <https://time.com/5319626/trump-nato-summit-military-spending-germany/>; Brian Klass, *America's Allies Despise Trump, and That's a Threat to NATO*, *WASHINGTON POST* (Dec. 6, 2019), <https://www.washingtonpost.com/opinions/2019/12/06/americas-allies-despise-trump-thats-threat-nato/>; Julian E. Barnes & Helene Cooper, *Trump Discussed Pulling U.S. From NATO, Aides Say Amid New Concerns Over Russia*, *NY TIMES* (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html>.

⁴⁴ Ashely Burrell, *Donald Trump Is Turning His Back On America's European Allies By Taking Troops Out of Germany*, *NATIONALINTEREST.ORG* (Aug. 5, 2020), <https://nationalinterest.org/feature/donald-trump-turning-his->

his policies seemingly pleased Russian President Vladimir Putin.⁴⁵ Weakening NATO plays directly into Putin's vision of a revitalized role for Russia.⁴⁶

Not only did Trump praise Putin and criticize our important allies, he also chose to believe Putin's obvious lie that Russia did not interfere in the 2016 presidential election.⁴⁷

Choosing to believe Putin forced Trump to repudiate the findings of the intelligence community in the United States.⁴⁸ But then, members of the intelligence community and of law enforcement

back-america%E2%80%99s-european-allies-taking-troops-out-germany-166276; Mark Moore, *Trump Orders Nearly 10K Troops Removed from Germany in 'Unacceptable' Move*, NY POST (Jun. 8, 2020, 9:23 AM), <https://nypost.com/2020/06/08/trump-orders-nearly-10k-troops-removed-from-germany/>; David M. Herszenhorn, *Trump Orders Large Withdrawal of U.S. Forces from Germany*, POLITICO (Jun. 6, 2020, 8:47 AM EDT), <https://www.politico.com/news/2020/06/06/trump-orders-large-withdrawal-of-us-forces-from-germany-304501>.

⁴⁵ CNN Wire, *Donald Trump Victory Shocks World, Pleases Putin*, WNEP.COM (Nov. 9, 2016, 7:34 AM EST), <https://www.wnep.com/article/news/local/bradford-county/donald-trump-victory-shocks-world-pleases-putin/523-81e47d0a-2662-462c-94f3-6f7ca0faed4c>; Steve Chapman, *Servile Trump Keeps Doing Favors For Putin*, NATIONAL MEMO (Oct. 27, 2019), <https://www.nationalmemo.com/servile-trump-keeps-doing-favors-for-putin>; Stephen Schlesinger, *Trump's Mysterious Relationship With Putin*, PASS BLUE (Sept. 14, 2020), <https://www.passblue.com/2020/09/14/trumps-mysterious-relationship-with-putin/>; Chris Cillizza, *Donald Trump Just Made Vladimir Putin Very Happy*, CNN (May 8, 2020, 11:50 AM ET), <https://www.cnn.com/2020/05/08/politics/donald-trump-vladimir-putin-russia/index.html>; *Donald Trump Knows How to Please Vladimir Putin*, CNN, available at: <https://demotix.com/donald-trump-know-please-vladimir-putin/>; Joel Gehrke, *'Useful Idiot': Alexander Vindman Dubs Trump 'An Unwitting Agent of Putin'*, WASHINGTON EXAMINER (Sept. 14, 2020), <https://www.washingtonexaminer.com/policy/defense-national-security/useful-idiot-alexander-vindman-dubs-trump-an-unwitting-agent-of-putin>.

⁴⁶ Jim Edwards, *Putin Got Exactly What He Wants From NATO This Week, Thanks to Trump*, INSIDER (Dec. 4, 2019, 5:59 AM), <https://www.insider.com/putin-got-what-he-wants-from-nato-trump-2019-12>; Stephen R. Covington, *Putin's Gamble: An End to NATO and Restoration of Russian Might*, NEWSWEEK (Sept. 9, 2015, 1:28 PM EDT), <https://www.newsweek.com/putins-gamble-end-nato-and-restoration-russian-might-368883>; Abdul Rasool Syed, *Putin's Impact on Russia & The World*, THE NATION (Jul. 12, 2019), <https://nation.com.pk/12-Jul-2019/putin-s-impact-on-russia-the-world>.

⁴⁷ Dylan Stableford, *Trump Says He Believes Putin That Russia Didn't Interfere in Election*, YAHOO! NEWS (Jul. 16, 2018), https://news.yahoo.com/trump-says-believes-putin-russia-didnt-interfere-election-165339955.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAA K4uFjw9J0ZAmvtgI2txWKz2zSL-4yC_k7CtGNQ6gzUN0P6vzbH7llWa4G1fmDnLLWO5K7_R7Zn2uwS3x9-Kumho0mA_cUkDRBpAlpmDNKXccVme0z4xmV7p625Xz4uX9xZa_uldJomLEgqne1DRgaEyzgCe05PFkimcaPEs8CVA; Jordan Fabian, *Trump Refuses to Denounce Russian Involvement in Election at Joint Presser with Putin*, THE HILL (Jul. 16, 2018, 12:12 PM EDT), <https://thehill.com/homenews/administration/397203-trump-denies-russian-involvement-in-election-at-joint-presser-with>; Chuck Todd, Mark Murray & Carrie Dann, *Trump Continues to Deny Russia Interfered in 2016. Here's Why That's a Problem.*, NBC NEWS (Jul. 2, 2018, 5:39 PM PDT), <https://www.nbcnews.com/politics/first-read/trump-continues-deny-russia-interfered-2016-here-s-why-s-n888206>.

⁴⁸ Alex Ward, *Trump Chooses Putin's Word Over the US Intelligence Community's — Again*, VOX (Nov. 11, 2017, 9:31 AM EST), <https://www.vox.com/2017/11/11/16636906/trump-russia-putin-intelligence>; see also Sonam Sheth, *Trump Says He Doesn't 'See Any Reason' Why Russia Would Have Hacked the US Election When Asked Whether He Believes Putin or the US Intel Community*, BUSINESS INSIDER (Jul. 16, 2018, 4:43 PM), <https://www.businessinsider.com/trump-putin-press-conference-election-meddling-2018-7>; Matthew Nussbaum, *Trump Publicly Sides with Putin on Election Interference*, POLITICO (Jul. 16, 2018, 5:46 PM EST), <https://www.politico.com/story/2018/07/16/trump-russia-putin-summit-722418>.

were, according to Trump, part of the deep state out to get him.⁴⁹ Trump’s treatment of then-Ukraine Ambassador Marie Yovanovitch and National Security Council Ukraine expert Alexander Vindman stunned even some Trump supporters who had said little to oppose him prior to their testimony leading up to Trump’s impeachment.⁵⁰ His firing or dismissal of many public officials for adherence to the legal, instead of showing fawning loyalty to him, threatened the rule of law.⁵¹

Despite election campaign claims in 2016 that he would drain the swamp, Trump, as measured by the number of members of his administration who were found guilty or plead guilty to a variety of criminal charges, led the most corrupt government in United States history.⁵² He

<https://www.vox.com/2017/11/11/16636906/trump-russia-putin-intelligence>

⁴⁹ Toluse Olorunnipa, Ashley Parker & Josh Dawsey, *Trump Embarks On Expansive Search for Disloyalty as Administration-Wide Purge Escalates*, WASHINGTON POST (Feb. 21, 2020, 5:16 PM PST), https://www.washingtonpost.com/politics/were-cleaning-it-out-trump-embarks-on-expansive-search-for-disloyalty-as-administration-wide-purge-escalates/2020/02/21/870e6c56-54c1-11ea-b119-4faabac6674f_story.html; Ken Dilanian, Carol E. Lee, Courtney Kube & Abigail Williams, *If the Deep State is Out to Get Trump, Why Aren’t More Officials Speaking Up Like Bolton?*, MSN NEWS (Jun. 28, 2020), <https://www.msn.com/en-us/news/politics/if-the-deep-state-is-out-to-get-trump-why-arent-more-officials-speaking-up-like-bolton/ar-BB163G5u>; Buck Sexton, *Buck Wild: ‘Is President Trump Paranoid or is the Deep State Out to Get Him?’*, THE HILL (Jul. 17, 2018), <https://thehill.com/hilltv/rising/397427-buck-wild-is-president-trump-paranoid-or-is-the-deep-state-out-to-get-him>; Chris Cillizza, *Trump’s ‘Deep State’ Conspiracy Theory Just Took a Big Hit*, CNN POLITICS (Feb. 4, 2020, 4:27 PM EDT), <https://www.cnn.com/2020/02/14/politics/andrew-mccabe-donald-trump-department-of-justice/index.html>; QAnon: *Trump Embraces Far-Right “Deep State” Conspiracy Theory Deemed a Threat by FBI*, DEMOCRACY NOW (Aug. 24, 2020), https://www.democracynow.org/2020/8/24/qanon_trump.

⁵⁰ Republicans condemned for smearing impeachment witnesses born abroad, THE GUARDIAN, <https://www.theguardian.com/us-news/2019/nov/17/trump-impeachment-inquiry-witnesses-vindman-yovanovitch> (last visited Feb. 26, 2021).

⁵¹ JEFFREY TOOBIN, TRUE CRIMES AND MISDEMEANORS: THE INVESTIGATION OF DONALD TRUMP (2020).

⁵² Kurt Bardella, *Trump Didn’t Drain the Swamp. Now Biden May Drown Him in It.*, USA TODAY (May 21, 2020, 3:15 AM ET), <https://www.usatoday.com/story/opinion/2020/05/21/trump-didnt-drain-swamp-biden-drown-him-column/5228137002/>; Heather Digby Parton, *Republicans Will Claim Trump Was Going After Corruption: You Just Have to Laugh*, SALON.COM (Nov. 13, 2019, 1:30 PM UTC), <https://www.salon.com/2019/11/13/republicans-will-claim-trump-was-going-after-corruption-you-just-have-to-laugh/>; Charlotte Alter & Ryan Teague Beckwith, *Draining the Swamp?*, TIME, <https://time.com/donald-trump-drain-swamp/> (last visited Jan. 1, 2021); Adam Andrzejewski, *A Progress Report - Is President Donald Trump “Draining the Swamp?”*, Forbes (Aug. 28, 2019, 11:33 AM EDT), <https://www.forbes.com/sites/adamandrzejewski/2019/08/28/a-progress-report-is-president-donald-trump-draining-the-swamp/?sh=125bcddf5706>; Rusty Weiss, *Trump Announces How He’ll Drain the Swamp In Washington*, THE MENTAL RECESSION (Oct. 6, 2016), <https://menrec.com/trump-announces-hell-drain-swamp-washington/>; David Atkins, *Trump Is The Most Crooked President in American History. That Should Matter.*, Washington Monthly (Oct. 11, 2020), <https://washingtonmonthly.com/2020/10/11/trump-is-the-most-crooked-president-in-american-history-that-should-matter/>; Sean Colarossi, *Trump Is Shattering Records For Presidential Corruption – And It Isn’t Even Close*, POLITICUS USA (Aug. 20, 2020),

used his pardon-commutation power in ways that seemed corrupt. For example, his commutation of Roger Stone's sentence was in flagrant disregard for Stone's efforts to frustrate Congress's legitimate inquiry into Russian involvement in Trump's election.⁵³ Not only does the commutation seem like cronyism, but it may well have been an obstruction of justice.⁵⁴

On the subject of obstruction of justice, Trump outmaneuvered Special Counsel Robert Mueller, again by adopting means almost unheard of in the past.⁵⁵ Trump pressured individuals around him to refuse to cooperate with Mueller's team, often raising implausible claims of privilege.⁵⁶ Despite Supreme Court precedent that seemingly supported Mueller's right to subpoena the President,⁵⁷ Trump refused efforts to interview him, leaving Mueller without critical evidence concerning Trump's knowledge about key meetings between Russians and members of Trump's inner circle.⁵⁸ Later, Trump hired William Barr as Attorney General, largely because Barr sent him a memo supporting Trump's extreme view of presidential power.⁵⁹

<https://www.politicususa.com/2020/08/20/trump-shattering-records-for-being-the-most-corrupt-president-in-history.html>.

⁵³ Mary Papenfuss, *'Most Corrupt President In History': Critics Reel After Trump Lets Roger Stone Stay Free*, HUFF POST (Jul. 11, 2020, 12:40 AM ET), https://www.huffpost.com/entry/roger-stone-donald-trump-reaction_n_5f092ec2c5b67a80bc07a657.

⁵⁴ *Id.*; Sam Berger, *Pardoning Roger Stone Could Itself Be an Unpardonable Crime*, JUSTSECURITY.ORG (Jul. 10, 2020), <https://www.justsecurity.org/71269/pardoning-roger-stone-could-itself-be-an-unpardonable-crime/>; Sarah K. Burris, *'Exhibit A for Obstruction': Legal Experts Say Roger Stone's Commutation is All About Trump Protecting Himself*, RAW STORY (Jul. 10, 2020), <https://www.rawstory.com/2020/07/exhibit-a-for-obstruction-legal-experts-say-roger-stones-commutation-is-all-about-trump-protecting-himself/>; Peter Baker, *In Commuting Stone's Sentence, Trump Goes Where Nixon Would Not*, NY TIMES (Jul. 11, 2020),

<https://www.nytimes.com/2020/07/11/us/politics/trump-roger-stone-nixon.html>; Jeffrey Toobin, *The Roger Stone Case Shows Why Trump is Worse Than Nixon*, NEW YORKER (Jul. 11, 2020),

<https://www.newyorker.com/news/daily-comment/the-roger-stone-case-shows-why-trump-is-worse-than-nixon>.

⁵⁵ JEFFREY TOOBIN, TRUE CRIMES AND MISDEMEANORS: THE INVESTIGATION OF DONALD TRUMP (2020).

⁵⁶ Mark Mazzetti, Maggie Haberman, Nicholas Fandos & Michael S. Schmidt, *Intimidation, Pressure and Humiliation: Inside Trump's Two-Year War on the Investigations Encircling Him*, NY TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/us/politics/trump-investigations.html>; Jim Acosta & Pamela Brown, *'Don't Cooperate': One Former Trump aide's Lesson From Mueller Probe*, CNN POLITICS (Apr. 17, 2019, 10:24 PM EDT), <https://www.cnn.com/2019/04/17/politics/trump-mueller-fallout/index.html>.

⁵⁷ See *Nixon v. United States*, 506 U.S. 224 (1993); see also *Clinton v. Jones*, 520 U.S. 681 (1997).

⁵⁸ Eric Tucker, Chad Day, & Jonathan Lemire, *Inside Trump's Refusal to Testify in the Mueller Probe*, AP NEWS (Nov. 21, 2018), <https://apnews.com/article/51e0159165044ea7bdec860c0baae089>.

⁵⁹ David Rohde, *William Barr, Trump's Sword and Shield*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/william-barr-trumps-sword-and-shield>; see also Manuel Roig-

Barr would later publish a highly misleading summary of the Mueller Report that allowed Trump to claim exoneration of criminal wrongdoing.⁶⁰ Anyone able to wade through the report, filled with redactions, should recognize that Mueller admitted being unable to get evidence about Trump's knowledge about the meetings.⁶¹ More importantly, while Mueller took the position that he was not authorized to conclude whether Trump committed crimes, the report strongly hints that Trump obstructed justice in several instances.⁶²

Trump's misconduct that led to the Mueller Report and later to his impeachment were hardly the only violations of the law. Prior to Trump's presidency, most Americans had never heard of the Emoluments Clause of the Constitution.⁶³ And yet, during his presidency, Trump made millions of dollars, almost certainly in violation of that clause.⁶⁴ After years of fighting to

Franzia & Tom Hamburger, *Bill Barr, Unbound*, WASHINGTON POST (Sept. 15, 2020), <https://www.washingtonpost.com/magazine/2020/09/15/william-barr-president-trump-perfect-match/?arc404=true>.

⁶⁰ David A. Graham, *Barr Misled the Public—And It Worked*, THE ATLANTIC (May 1, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/barr-misled-the-publicand-it-worked/588463/>; see also Salvador Rizzo, *What Attorney General Barr Said vs. What the Mueller Report Said*, WASHINGTON POST (Apr. 18, 2019, 11:00 PM), <https://www.washingtonpost.com/politics/2019/04/19/what-attorney-general-barr-said-vs-what-mueller-report-said/>.

⁶¹ *Mueller Finds No Collusion with Russia, Leaves Obstruction Question Open*, ABA NEWS, <https://www.americanbar.org/news/abanews/aba-news-archives/2019/03/mueller-concludes-investigation/> (last visited Feb. 19, 2021); see also Mark Mazzetti & Katie Benner, *Mueller Finds No Trump-Russia Conspiracy, but Stops Short of Exonerating President on Obstruction*, NY TIMES (Mar. 24, 2019), <https://www.nytimes.com/2019/03/24/us/politics/mueller-report-summary.html>; *Mueller Report Findings: Mueller Rejects Argument That Trump is Shielded From Obstruction Laws*, WASHINGTON POST (Apr. 18, 2019, 2:42 PM), https://www.washingtonpost.com/politics/mueller-report-russia-investigation-findings/2019/04/18/b07f4310-56f9-11e9-814f-e2f46684196e_story.html.

⁶² Timothy L. O'Brien, *Does Mueller Think Trump's Guilty? Read Closely*, BLOOMBERG (Apr. 19, 2019, 2:00 AM), <https://www.bloomberg.com/opinion/articles/2019-04-19/mueller-report-strongly-hints-that-trump-s-guilty>; see also Sean Illing, *Does the Mueller Report Exonerate Trump? I Asked 12 Legal Experts.*, VOX (Apr. 20, 2019, 9:20 AM), <https://www.vox.com/2019/4/18/18484731/mueller-report-trump-barr-obstruction-legal-experts>.

⁶³ U.S. CONST. ART. I, § 9, CL. 8.

⁶⁴ Jeff Stein & Libby Nelson, *Donald Trump and The Emoluments Clause, Explained*, VOX (Jan. 24, 2017, 12:09 PM EST), <https://www.vox.com/policy-and-politics/2016/11/23/13715150/donald-trump-emoluments-clause-constitution>; see also Karen Yourish & Larry Buchanan, *Trump Still Makes Money From His Properties. Is This Constitutional?*, NY TIMES (Jul. 10, 2019), <https://www.nytimes.com/interactive/2018/12/17/us/politics/trump-emoluments-money.html?mtrref=www.google.com&assetType=REGIWALL>.

keep his tax returns hidden from public view, Trump lost that battle in 2020.⁶⁵ Some commentators suspect questionable deductions that may amount to tax fraud.⁶⁶

Trump showed extraordinary contempt for international agreements and organizations. He pulled out of the 2015 Paris Accords,⁶⁷ the Transpacific Partnership,⁶⁸ and the World Health Organization.⁶⁹ He began tariff wars with political rivals and allies, almost aimlessly.⁷⁰ He adopted anti-immigrant positions that appealed to racism and that violated basic human rights.⁷¹

⁶⁵ Russ Buettner, Susanne Craig & Mike McIntire, *Trump's Tax Returns*, NY TIMES (Sept. 27, 2020), <https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html>; see also Daniel Hemel, *Trump Lost at the Supreme Court, but We Still Won't See His Taxes by November*, WASHINGTON POST (Jul. 10, 2020, 9:48 AM), https://www.washingtonpost.com/outlook/trump-taxes-delay-election/2020/07/10/3e9ae314-c2a8-11ea-b178-bb7b05b94af1_story.html.

⁶⁶ *Id.*; see also Joyce M. Rosenberg, *Trump Business Deductions: Sketchy, Normal or In-Between?*, AP NEWS (Oct. 1, 2020), <https://apnews.com/article/donald-trump-archive-c641731906789c1e272c684a910ee98e>; Elie Mystal, *Trump is Either a Tax Fraud or the World's Worst Businessman*, WASHINGTON POST (Sept. 28, 2020, 6:43 AM), <https://www.washingtonpost.com/outlook/2020/09/28/trump-taxes-fraud-business-failure/>.

⁶⁷ Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, NY TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html>; see also Brian Resnick, *Trump is Pulling the US Out of the Paris Climate Agreement. Some Men Just Want to Watch the World Burn.*, VOX (Jun. 1, 2017), <https://www.vox.com/energy-and-environment/2017/6/1/15725510/trump-pulls-us-out-of-paris-climate-deal>.

⁶⁸ Andrew Glass, *Trump Scuttles Trans-Pacific Trade Pact*, POLITICO (Jan. 23, 2019, 12:20 AM EST), <https://www.politico.com/story/2019/01/23/trans-pacific-trade-pact-2017-1116638>; see also Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, NY TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>; Adam Taylor, *A timeline of Trump's complicated relationship with the TPP*, WASHINGTON POST (Apr. 13, 2018, 6:59 AM), <https://www.washingtonpost.com/news/worldviews/wp/2018/04/13/a-timeline-of-trumps-complicated-relationship-with-the-tpp/>.

⁶⁹ Sebastian Rotella, James Bandler & Patricia Callahan, *Inside the Trump Administration's Decision to Leave the World Health Organization*, PRO PUBLICA (Jun. 20, 2020, 5:00 AM EDT), <https://www.propublica.org/article/inside-the-trump-administrations-decision-to-leave-the-world-health-organization>; see also *Coronavirus: Trump Moves to Pull US Out of World Health Organization*, BBC NEWS (Jul. 7, 2020), <https://www.bbc.com/news/world-us-canada-53327906>.

⁷⁰ *How Trump's Trade War Is Being Fought Around the World*, NY TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/business/trade-war-trump.html>; see also Heather Long, *Trump Has Officially Put More Tariffs on U.S. Allies than on China*, WASHINGTON POST (May 31, 2018, 1:34 PM), <https://www.washingtonpost.com/news/wonk/wp/2018/05/31/trump-has-officially-put-more-tariffs-on-u-s-allies-than-on-china/>.

⁷¹ Alexandra Schmitt, *President Trump's Alarming Human Rights Agenda at Home and Abroad*, AmericanProgress.org (Dec. 10, 2019, 9:02 AM), <https://www.americanprogress.org/issues/security/reports/2019/12/10/478458/president-trumps-alarming-human-rights-agenda-home-abroad/>; see also Julissa Arce, *Trump's Anti-Immigrant Rhetoric Was Never About Legality — It Was About Our Brown Skin*, TIME (Aug. 6, 2019, 4:47 PM EDT), <https://time.com/5645501/trump-anti-immigration-rhetoric-racism/>; Paul A. Kramer, *Trump's Anti-Immigrant Racism Represents an American Tradition*, NY TIMES (Jan. 22, 2018), <https://www.nytimes.com/2018/01/22/opinion/trumps-anti-immigrant-racism-represents-an-american-tradition.html>.

Many presidents have gained national support in times of crisis. The second President Bush reassured the nation after the attacks on 9/11.⁷² President Obama calmed Americans after the massacre at Sandy Hook Elementary School.⁷³ Faced with similar moments to unite Americans, Trump divided America. His comments that there were good people on both sides of the protests in Charlottesville are notorious: he was giving comfort to neo-Nazis and Klansmen.⁷⁴ Trump even failed to take a moment to acknowledge one of America's great Civil Rights heroes. Interviewed by Jonathan Swan on Axios HBO, Trump was unable to say whether recently deceased Civil Rights hero John Lewis was impressive.⁷⁵ Why not? Apparently because John Lewis protested Trump's election and refused to attend his inauguration.⁷⁶ But then, he had bad things to say about Senator John McCain, both before and after his death.⁷⁷ By stark contrast,

⁷² See, e.g., James N. Schubert, Patrick A. Stewart & Margaret Ann Curran, *A Defining Presidential Moment: 9/11 and the Rally Effect*, 23 POLITICAL PSYCHOLOGY 559 (2002).

⁷³ Megan Slack, *President Obama Speaks on the Shooting in Connecticut*, WHITE HOUSE ARCHIVES (Dec. 14, 2012, 3:34 PM ET), <https://obamawhitehouse.archives.gov/blog/2012/12/14/president-obama-speaks-shooting-connecticut>; see also Just Like Anyone Else's Kids, HISTORY.COM, <https://www.history.com/the-obama-years/newtown.html> (last visited Feb. 22, 2021).

⁷⁴ Rick Klein, Trump Said 'Blame on Both Sides' in Charlottesville, Now the Anniversary Puts Him on the Spot, ABC NEWS (Aug. 12, 2018, 6:57 AM), <https://abcnews.go.com/Politics/trump-blame-sides-charlottesville-now-anniversary-puts-spot/story?id=57141612>; see also Rosie Gray, Trump Defends White-Nationalist Protesters: 'Some Very Fine People on Both Sides', THE ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/>.

⁷⁵ David Nather, Exclusive: Trump Declines to Praise John Lewis, Citing Inauguration Snub, AXIOS (Aug. 4, 2020), <https://www.axios.com/trump-john-lewis-inauguration-1adc0747-51b8-4990-a7d8-29290e990dc5.html>; see also Quint Forgey, *Trump: 'I Can't Say One Way or the Other' Whether John Lewis Was Impressive*, POLITICO (Aug. 4, 2020, 8:41 AM EDT), <https://www.politico.com/news/2020/08/04/trump-john-lewis-impressive-391215>; Tim Elfrink, *'I Don't Know John Lewis': Trump Bashes Deceased Civil Rights Leader for Skipping His Inauguration*, WASHINGTON POST (Aug. 4, 2020, 2:09 AM), <https://www.washingtonpost.com/nation/2020/08/04/trump-john-lewis-axios-swain/>.

⁷⁶ *Id.*

⁷⁷ Cristal Hayes, *President Donald Trump on the Late Sen. John McCain: 'He Did the Nation a Tremendous Disservice'*, USA TODAY (Apr. 25, 2019, 11:24 PM ET), <https://www.usatoday.com/story/news/politics/2019/04/25/donald-trump-john-mccain-disservice-america/3581009002/>; see also David A. Graham, *John McCain's Death Brought Out the Worst in the Trump Administration*, THE ATLANTIC (Aug. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/08/trumps-reaction-to-mccain-as-microcosm/568696/>; John Cassidy, *Donald Trump Response to John McCain's Death Reminds Us Just How Petty He Is*, THE NEW YORKER (Aug. 27, 2018), <https://www.newyorker.com/news/our-columnists/donald-trumps-response-to-john-mccains-death-reminds-us-just-how-petty-and-small-he-is>.

during the first presidential debate with Joe Biden, Trump was unwilling to condemn white nationalists.⁷⁸

Forget Trump's failure to address the nation at moments of crisis in ways that would heal deep divisions, when instead he used inflammatory rhetoric aimed at exciting his base. Before the 2020 election, Trump made several inconsistent statements about absentee ballots.⁷⁹ He attempted to distinguish between mail-in ballots (subject to massive fraud) and absentee ballots, despite any meaningful difference between the two methods of voting.⁸⁰ While claiming that he was concerned about the fairness of the election, Trump sued various states, including Nevada, over their mail-in voter registration laws.⁸¹ Further, he threatened to reduce funding for the Post Office a few months before the election, creating a risk that mail-in ballots would not be counted.⁸² During his first debate with Joe Biden, Trump refused to agree that he would step down if he lost the election.⁸³

⁷⁸ Sarah McCammon, *From Debate Stage, Trump Declines to Denounce White Supremacy*, NPR (Sept. 30, 2020 12:37 AM ET), <https://www.npr.org/2020/09/30/918483794/from-debate-stage-trump-declines-to-denounce-white-supremacy>; see also Megan Vasquez & Paul LeBlanc, *Trump Refuses to Condemn White supremacists at Presidential Debate*, CNN POLITICS (Sept. 30, 2020, 9:22 AM ET), <https://www.cnn.com/2020/09/30/politics/proud-boys-trump-white-supremacists-debate/index.html>.

⁷⁹ Miles Parks, *Ignoring FBI And Fellow Republicans, Trump Continues Assault on Mail-In Voting*, NPR (Aug. 28, 2020), <https://www.npr.org/2020/08/28/906676695/ignoring-fbi-and-fellow-republicans-trump-continues-assault-on-mail-in-voting>; see also Joey Garrison, *'Mailmen Selling Ballots. Dumped in Rivers. Found in Creeks': Trump Makes Unfounded Claims About Mail-In Voting*, USA TODAY (Sept. 30, 2020, 4:09 PM EDT), <https://www.usatoday.com/story/news/politics/elections/2020/09/30/2020-debate-trump-makes-outrageous-claims-mail-voting/3586836001/>.

⁸⁰ *Id.*

⁸¹ Joe Sutton, *Trump Campaign Sues Nevada Over Plan to Mail Ballots to all Registered Voters*, CNN (Aug. 5, 2020, 12:49 PM ET), <https://www.cnn.com/2020/08/05/politics/trump-campaign-nevada-mail-in-ballots/index.html>; see also Connor Perrett, *The Trump Campaign is Waging an All-Out Legal War to Stop the Expansion of Vote-by-Mail in 7 Different States*, BUSINESS INSIDER (Sept. 27, 2020, 7:50 PM), <https://www.businessinsider.com/trump-is-involved-in-litigation-about-voting-2020-9>.

⁸² Sam Levine, *Trump Admits He is Undermining USPS to Make it Harder to Vote by Mail*, THE GUARDIAN (Aug. 13, 2020, 12:25 EDT), <https://www.theguardian.com/us-news/2020/aug/13/donald-trump-usps-post-office-election-funding>; see also Deb Riechmann & Anthony Izaguirre, *Trump Admits He's Blocking Postal Cash to Stop Mail-In Votes*, AP NEWS (Aug. 13, 2020), <https://apnews.com/article/14a2ceda724623604cc8d8e5ab9890ed>.

⁸³ Sahil Kapur, *Trump Has Signaled He Won't Accept an Election Loss. Many of His Voters Agree.*, NBC NEWS (Oct. 29, 2020, 7:11 AM), <https://www.nbcnews.com/politics/2020-election/trump-has-signaled-he-won-t-accept-election-loss-many-n1245304>; see also Kevin Breuninger, *Trump Won't Commit to Peaceful Transfer of Power if*

About three months before the election, Trump floated the idea of postponing the election because of the pandemic.⁸⁴ That idea so violated legal and political norms that Professor Steven Calabresi, co-founder of the Federalist Society, published an op-ed stating the Trump's conduct was impeachable.⁸⁵

About a month before the election, federal and state officials arrested members of a Michigan anti-government militia group for plotting to kidnap Michigan Governor Gretchen Whitmer.⁸⁶ At least according to news reports, her sin was taking an aggressive stance to prevent the spread of COVID-19.⁸⁷ Reportedly, at a campaign rally, Trump's supporters chanted, "Lock her up," leading Trump to laugh and comment, "Lock them all up."⁸⁸ His behavior left many Republicans looking to distance themselves from his divisiveness.⁸⁹

One can find far more examples of Trump's recklessness. For example, think January 6, 2021 and his role in inspiring the murderous raid on the Capitol. These are only some of the ways in which Trump ignored or openly violated political norms. Not surprisingly, perhaps, his

He Loses the Election, CNBC (Sept. 23, 2020, 6:32 PM EDT), <https://www.cnbc.com/2020/09/23/trump-wont-commit-to-peaceful-transfer-of-power-if-he-loses-the-election.html>.

⁸⁴ Zeke Miller & Colleen Long, *Trump Floats Idea of Election Delay, a Virtual Impossibility*, AP NEWS (Jul. 30, 2020), <https://apnews.com/article/financial-markets-ap-top-news-presidential-elections-health-media-d203eaa406dc5e7362dfa9e33522195e>.

⁸⁵ Steven Calabresi, *Trump Might Try to Postpone the Election. That's Unconstitutional*, NY TIMES (Jul. 30, 2020), <https://www.nytimes.com/2020/07/30/opinion/trump-delay-election-coronavirus.html>.

⁸⁶ Nicholas Bogel-Burroughs, Shaila Dewan & Kathleen Gray, *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, NY TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html>.

⁸⁷ Nicholas Bogel-Burroughs, Shaila Dewan & Kathleen Gray, *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, NY TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html>.

⁸⁸ Amanda Marcotte, *Trump is Falling Way Behind with Female Voters. His response? "Lock her up!"*, SALON.COM (Oct. 19, 2020, 5:26 PM), <https://www.salon.com/2020/10/19/trump-is-falling-way-behind-with-female-voters-his-response-lock-her-up/>.

⁸⁹ Nicholas Bogel-Burroughs, Shaila Dewan & Kathleen Gray, *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, NY TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html>.

behavior led to push back from many more traditional Republicans, at least those not in Congress or other elected office. This is the focus of the next section.

(b) Competing Narratives

Numerous Republicans and traditional conservatives weighed in on Trump's presidency and announced that they could not support his reelection.⁹⁰ His Republican critics shared one similarity: they announced their opposition to Trump's reelection.⁹¹ Some, notably John Bolton, found that Trump was not conservative enough.⁹²

Among other more mainstream Republicans, two competing narratives emerged. Many traditional Republicans announced they would vote for Biden or not vote for Trump, and some Republicans abandoned the party because they saw Trump as abandoning the principles of the Republican Party.⁹³ Others disagreed and have argued that Trump was a manifestation of a long trend in the Republican Party.⁹⁴ Each position has some truth behind it.

A group of conservatives who served under President George W. Bush formed "43 Alumni for Joe Biden."⁹⁵ It included at least 230 conservatives, primarily Republicans, who worked on Bush's 2000 and 2004 campaigns.⁹⁶ Their website indicated that they did not oppose

⁹⁰ Jacob Knutson & Rashaan Ayesh, *The Top Republicans Who Aren't Voting for Trump in 2020*, AXIOS (Oct. 20, 2020), <https://www.axios.com/republicans-not-voting-for-trump-in-2020-9e2f02fa-0f36-418d-bedd-ed53181dd99c.html>.

⁹¹ *Id.*

⁹² Allyson Chiu, *'I'm Not Going to Vote for Him': John Bolton Calls Trump a 'Danger for the Republic'*, WASHINGTON POST (June 22, 2020, 12:48 AM), <https://www.washingtonpost.com/nation/2020/06/22/trump-bolton-abc-book/>.

⁹³ Jacob Knutson & Rashaan Ayesh, *The Top Republicans Who Aren't Voting for Trump in 2020*, Axios (Oct. 20, 2020), <https://www.axios.com/republicans-not-voting-for-trump-in-2020-9e2f02fa-0f36-418d-bedd-ed53181dd99c.html>.

⁹⁴ See, e.g., STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* (2020).

⁹⁵ Tim Reid, *Exclusive: Hundreds of George W. Bush Administration Officials to back Biden, Group Says*, REUTERS (Jul. 1, 2020), <https://www.reuters.com/article/us-usa-election-biden-republicans-exclus/exclusive-hundreds-of-george-w-bush-administration-officials-to-back-biden-group-says-idUSKBN24253R>.

⁹⁶ *Id.*

the Republican Party.⁹⁷ Instead, they saw Trump as the problem. “Republican Voters Against Trump” was a similar group, again dedicated to electing Biden and with a hope to revitalize the Republican Party after Trump’s departure.⁹⁸

Yet another group formed to oppose Trump was the Lincoln Project.⁹⁹ It included prominent Republicans, including George T. Conway III, Kellyanne Conway’s husband.¹⁰⁰ Kellyanne Conway, of course, was a counselor to Trump.¹⁰¹ George Conway and his colleagues described the Lincoln project as “an effort to highlight our country’s story and values, and its people’s sacrifices and obligations.”¹⁰² The Lincoln Project also critiqued other Republicans for allowing, embracing, and defending the President and his actions.¹⁰³ The Lincoln Project appealed to many Republicans’ sense of patriotism, calling on the need to “do right” by our military members and referring to Abraham Lincoln as their inspiration.¹⁰⁴

Several public intellectuals, fairly characterized as traditional conservatives, announced their decision to oppose Trump as well. For example, David Brooks, New York Times columnist, wrote frequently about his disaffection with Trump.¹⁰⁵ Like members of the Lincoln Project and other similar organizations, Brooks’ focus was on ways in which Trump abandoned core values of the Republican Party.¹⁰⁶ He emphasized Trump’s “bigotry, incompetence and tax

⁹⁷ *43 Alumni for Joe Biden*, <https://43alumniforamerica.com/> (last visited Feb. 26, 2021).

⁹⁸ *Republican Voters Against Trump*, <https://rvat.org/> (last visited Feb. 26, 2021).

⁹⁹ *The Lincoln Project: Dedicated Americans Protecting Democracy*, <https://lincolnproject.us/> (last visited Feb. 26, 2021).

¹⁰⁰ John Haltiwanger, *Kellyanne Conway’s Husband and Other Republicans Launch Project Dedicated to Defeating Trump in 2020*, BUSINESS INSIDER (Dec. 17, 2019), <https://www.businessinsider.in/politics/news/kellyanne-conways-husband-and-other-republicans-launch-project-dedicated-to-defeating-trump-in-2020/articleshow/72854655.cms>.

¹⁰¹ *Id.*

¹⁰² George Conway III, Steve Schmidt, John Weaver & Rick Wilson, *We Are Republicans and We Want Trump Defeated*, THE LINCOLN PROJECT, <https://lincolnproject.us/news/the-urgency-of-defeating-trump-falls-to-all-of-us/>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See e.g., David Brooks, NY TIMES, <https://www.nytimes.com/column/david-brooks> (last visited Feb. 26, 2021).

¹⁰⁶ *Id.*

cuts for the wealthy.”¹⁰⁷ He indicated special ire towards Trump and his family whom he identified as manipulative, selfish, petty, and untrustworthy.¹⁰⁸ Brooks saw Trump as “impulse-driven, narcissistic and intellectually dishonest.”¹⁰⁹

George Will, yet another public intellectual, also announced his opposition to Trump.¹¹⁰ Like Brooks, Will, who seemed willing to endorse much of the Republican Party’s earlier move to the far right, had enough with the Party.¹¹¹ His Washington Post op-ed’s headline said it all: *Trump Must be Removed. So Must His Congressional Enablers.*¹¹² As was the case with Brooks, Will’s primary focus was on Trump, whom he called the “Crybaby-in-Chief.”¹¹³

Former Republican, now independent Max Boot was yet another Trump critic.¹¹⁴ Boot, who considers himself a Reagan conservative,¹¹⁵ had a successful career as a foreign policy advisor for Republicans such as John McCain, Mitt Romney, and Marco Rubio.¹¹⁶ Boot described Trump as “a liar, an ignoramus and a moral abomination.”¹¹⁷ Boot abandoned the

¹⁰⁷ David Brooks, *Where Do Republicans Go From Here?*, NY TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/opinion/sunday/republican-party-trump-2020.html>.

¹⁰⁸ David Brooks, *Trump and the Politics of ‘Mean World’*, NY TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/27/opinion/trump-republicans-2020.html>.

¹⁰⁹ David Brooks, *Trump Has Made Us All Stupid*, NY Times (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/opinion/trump-iran-media.html>.

¹¹⁰ See, e.g., George Will, *Opinion: Trump Must be Removed. So Must His Congressional Enablers.*, Washington Post, https://www.washingtonpost.com/opinions/no-one-should-want-four-more-years-of-this-taste-of-ashes/2020/06/01/1a80ecf4-a425-11ea-bb20-ebf0921f3bbd_story.html.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ David Corn, “*We Need to Destroy the Republican Party*”: *A Conservative Luminary Calls for a Clean Start*, MOTHER JONES (Oct. 2018), <https://www.motherjones.com/politics/2018/10/destroy-the-republican-party-max-boot-calls-for-a-clean-start/>.

¹¹⁵ Damon Linker, *Did Max Boot Turn His Back on the Republican Party, or Did the Party Turn Its Back on Him?*, NY TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/books/review/max-boot-the-corrosion-of-conservatism.html>.

¹¹⁶ Max Beauchamp, *One of the GOP’s Biggest Hawks Explains Why He’d Vote for Clinton Over Trump*, VOX (Mar. 1, 2016, 3:40 PM EST), <https://www.vox.com/2016/3/1/11141308/donald-trump-hillary-clinton-max-boot>.

¹¹⁷ Damon Linker, *Did Max Boot Turn His Back on the Republican Party, or Did the Party Turn Its Back on Him?*, NY Times (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/books/review/max-boot-the-corrosion-of-conservatism.html>.

Republican Party when Trump beat Hillary Clinton in the 2016 election.¹¹⁸ Boot argued that the Republican Party that he had once known and loved had failed him by endorsing Trump's personality and policy positions.¹¹⁹

Boot also argued that Trump was concerned only with his own interests and used the federal government to serve those interests.¹²⁰ He identified Trump's failure in handling the coronavirus crisis as more proof of Trump's failure as a leader.¹²¹ In Boot's words, "Donald Trump is the worst president in history."¹²²

Boot's bill of indictment of Trump included more. For example, he pointed to Trump's praise for China's prison camps, his embrace of "white power," and his view that Black Lives Matter is "a symbol of hate."¹²³ Boot concluded that, Trump "has disgraced the nation's highest office as no previous occupant has come close to doing."¹²⁴

¹¹⁸ Max Beauchamp, *One of the GOP's Biggest Hawks Explains Why He'd Vote for Clinton Over Trump*, Vox (Mar. 1, 2016, 3:40 PM EST), <https://www.vox.com/2016/3/1/11141308/donald-trump-hillary-clinton-max-boot>.

¹¹⁹ Damon Linker, *Did Max Boot Turn His Back on the Republican Party, or Did the Party Turn Its Back on Him?*, NY Times (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/books/review/max-boot-the-corrosion-of-conservatism.html>; see also Max Boot, *Opinion: The Worst President. Ever.*, Washington Post (Apr. 5, 2020, 5:00 AM), <https://www.washingtonpost.com/opinions/2020/04/05/worst-president-ever/>.

¹²⁰ Damon Linker, *Did Max Boot Turn His Back on the Republican Party, or Did the Party Turn Its Back on Him?*, NY Times (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/books/review/max-boot-the-corrosion-of-conservatism.html>; see also Max Beauchamp, *One of the GOP's Biggest Hawks Explains Why He'd Vote for Clinton Over Trump*, Vox (Mar. 1, 2016, 3:40 PM EST), <https://www.vox.com/2016/3/1/11141308/donald-trump-hillary-clinton-max-boot>; Max Boot, *Opinion: The Worst President. Ever.*, Washington Post (Apr. 5, 2020, 5:00 AM), <https://www.washingtonpost.com/opinions/2020/04/05/worst-president-ever/>.

¹²¹ Max Boot, *Opinion: The Worst President. Ever.*, Washington Post (Apr. 5, 2020, 5:00 AM), <https://www.washingtonpost.com/opinions/2020/04/05/worst-president-ever/>.

¹²² *Id.*

¹²³ Max Boot, *Opinion: The Worst President Ever Keeps Getting Worse*, WASHINGTON POST (Jul. 11, 2020, 5:25 AM), <https://www.washingtonpost.com/opinions/2020/07/11/worst-president-ever-keeps-getting-worse/>.

¹²⁴ *Id.*

The common thread that turned Trump’s critics against him was Trump himself. Insofar as they rejected the Republican Party, it was because elected Republicans and members of the government enabled Trump to abandon the Party’s core principles.¹²⁵

Despite that thesis, other critics who have abandoned Trump or the Republican Party argue that Trump was the culmination of years of policy changes in the party.¹²⁶ That critique focuses on many policy positions dating back to the 1960s and beyond that signaled the Party’s change of direction.¹²⁷ Indeed, the critique focuses on why Republican members of Congress have gone along with Trump, whom many of them scorned during the 2016 election campaign.¹²⁸

Think about the scorn with which Lindsay Graham and Ted Cruz treated Trump as a candidate.¹²⁹ Despite that, they have signed onto many of his initiatives.¹³⁰ Mitch McConnell, the

¹²⁵ Charles J. Sykes, *Republicans Are Now Conceding Their Core Values*, TIME (Jul. 27, 2018, 9:22 AM EDT), <https://time.com/5351087/republicans-donald-trump-values/>.

¹²⁶ Sean Illing, “*The Central Weakness of our Political System Right Now is the Republican Party*”, VOX (Jan. 13, 2021, 12:40 PM EST), <https://www.vox.com/policy-and-politics/22151075/trump-republican-party-american-democracy-daniel-ziblatt>; Christopher Ingraham, *This Astonishing Chart Shows How Moderate Republicans Are An Endangered Species*, WASHINGTON POST (Jun. 2, 2015, 3:45 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/06/02/this-astonishing-chart-shows-how-republicans-are-an-endangered-species/>; Stuart Rothenberg, *Four Decades and Counting — the GOP’s Shift to the Right is Bigger Than the Democrats’ Shift Left*, ROLL CALL (Dec. 16, 2020, 6:00 AM), <https://www.rollcall.com/2020/12/16/four-decades-and-counting-the-gop-shift-to-the-right-is-bigger-than-the-democrats-shift-left/>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Seung Min Kim, *Graham: Choice Between Trump, Cruz Like ‘Being Shot or Poisoned’*, POLITICO (Jan. 21, 2016, 2:27 PM EST), <https://www.politico.com/story/2016/01/lindsey-graham-trump-cruz-choice-218069>; see also *Cruz Attacks ‘Serial Philanderer’ Trump as Republican Race Enters ‘The Abyss’*, THE GUARDIAN, <https://www.theguardian.com/us-news/2016/may/03/donald-trump-ted-cruz-jfk-assassination-indiana-primary-philanderer> (last visited Feb. 26, 2021).

¹³⁰ See, e.g., Ed Kilgore, *Lindsay Graham’s Latest Mission: Encouraging Trump’s Blood Lust*, NY MAG (Sept. 11, 2018), <https://nymag.com/intelligencer/2018/09/lindsay-grahams-mission-encouraging-trumps-blood-lust.html>; *Senator Ted Cruz on Donald Trump: Then and Now*, BBC NEWS (Jan. 4, 2021), <https://www.bbc.com/news/av/world-us-canada-55540215>.

consummate politician, has tolerated Trump because although he may not have been able to moderate Trump's excesses, Trump has been good for the long-term Republican agenda.¹³¹

Trump has flaunted some Republican priorities. His tariff wars have troubled many traditional free-trade Republicans, for example.¹³² Some of crass behavior has bothered supporters.¹³³ At its core, though, much of the Trump agenda follows the recent Republican Party's move to the far right.¹³⁴ What follows provides a sampling of how Trump and the Republican Party's policy preferences overlap.

Start with race. At first blush, Republicans must be embarrassed with Trump's overt racism.¹³⁵ The GOP, after all, is (was) the party of Abraham Lincoln.¹³⁶ During Trump's September 29, 2020 debate with Biden, Trump refused to disavow white supremacist organizations, giving great comfort, for example, to the Proud Boys.¹³⁷ His unwillingness to do so produced a rare moment of pushback from some Republicans in Congress. For example, McConnell joined the only African American Republican Senator, Tim Scott, in condemning

¹³¹ Carl Hulse, *The Relationship Between McConnell and Trump Was Good for Both — Until It Wasn't*, NY TIMES (Feb. 19, 2021), <https://www.nytimes.com/2021/02/19/us/trump-mcconnell-republicans.html>.

¹³² Sean Sullivan & Jenna Johnson, *Donald Trump Starts a Trade War — With the Republican Party*, WASHINGTON POST (Jul. 30, 2016), https://www.washingtonpost.com/politics/donald-trump-starts-a-trade-war--with-the-republican-party/2016/06/30/25eec89a-3eda-11e6-84e8-1580c7db5275_story.html; see also Burgess Everett & Marianne Levine, *Trump Conquers Republicans on Trade*, POLITICO (Dec. 2, 2019, 7:39 PM EST), <https://www.politico.com/news/2019/12/02/trump-conquers-republicans-on-trade-074857>.

¹³³ Tamara Lush, *They Wanted Disruption in 2016. Now They Are Trump Defectors.*, AP NEWS (Sept. 28, 2020), <https://apnews.com/article/election-2020-donald-trump-religion-virus-outbreak-race-and-ethnicity-4b9c9d7a7aa46c523047a3a0e932e2a8>.

¹³⁴ Sean Illing, *"The Central Weakness of our Political System Right Now is the Republican Party"*, Vox (Jan. 13, 2021, 12:40 PM EST), <https://www.vox.com/policy-and-politics/22151075/trump-republican-party-american-democracy-daniel-ziblatt>.

¹³⁵ Ed Mazza, *Mary Trump Has Terrifying Explanation for Trump's White Supremacist Comments*, HUFF POST (Oct. 1, 2020, 5:25 AM ET), https://www.huffpost.com/entry/mary-trump-white-supremacists_n_5f7570e1c5b6d698bb282a99.

¹³⁶ Sidney Blumenthal, *Donald Trump's Republican Party is Not the Party of Lincoln*, WASHINGTON POST (Sept. 4, 2019, 2:00 AM), <https://www.washingtonpost.com/outlook/2019/09/04/donald-trumps-republican-party-is-not-party-lincoln/>.

¹³⁷ *Trump Refuses to Denounce White Supremacy in Chaotic Debate*, NY TIMES, <https://www.nytimes.com/live/2020/09/29/us/presidential-debate-trump-biden> (last visited Feb. 26, 2021).

Trump for not disavowing white supremacy during the debate.¹³⁸ Some others joined Scott and McConnell.¹³⁹

One needs to ask whether McConnell, for example, condemned Trump's refusal to disavow white supremacy for political purposes, rather than as a matter of principle. Some notable former Republicans have acknowledged the Party's long strategy to appeal to aggrieved whites, including white supremacists.¹⁴⁰

Longtime political consultant Stuart Stevens recently published a book explaining his disaffection with the Republican Party.¹⁴¹ He traced the beginning of what would later be described as the Southern Strategy back to a speech by Barry Goldwater in 1961.¹⁴² Goldwater argued that, "We're not going to get the Negro vote as a bloc in 1964 or 1968, so we ought to go hunting where the ducks are."¹⁴³ As Goldwater predicted, African Americans abandoned the Republican Party in 1964 and have never returned.¹⁴⁴

¹³⁸ Alexander Burns, Jonathan Martin & Maggie Haberman, *G.O.P. Alarmed by Trump's Comments on Extremist Group, Fearing a Drag on the Party*, NY TIMES (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/us/politics/trump-debate-white-supremacy.html>.

¹³⁹ Nicholas Wu, *Republicans in Congress Say Trump Should Have Directly Condemned White Supremacists at Presidential Debate*, USA TODAY (Sept. 30, 2020, 11:19 AM), <https://www.usatoday.com/story/news/politics/elections/2020/09/30/gop-senators-trump-should-have-directly-condemned-white-supremacists/3571277001/>.

¹⁴⁰ Simon Clark, *How White Supremacy Returned to Mainstream Politics*, AMERICANPROGRESS.ORG (Jul. 1, 2020, 9:02 AM), <https://www.americanprogress.org/issues/security/reports/2020/07/01/482414/white-supremacy-returned-mainstream-politics/>.

¹⁴¹ See generally STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* (2020); see also *Longtime GOP Strategist Says He'll 'Work with Democrats' to Defeat Trump*, PBS.ORG, <https://www.pbs.org/newshour/show/longtime-gop-strategist-says-hell-work-with-democrats-to-defeat-trump> (last visited Feb. 26, 2021).

¹⁴² STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* (2020).

¹⁴³ *Id.* at 13 (2020).

¹⁴⁴ *Id.*

Richard Nixon’s appeal to the white working class during the 1968 presidential campaign is well-documented.¹⁴⁵ He was able to undercut avowed segregationist George Wallace’s overt appeal to racism by using “dog whistle” messages like his call for Law and Order.¹⁴⁶ No one listening to Nixon in 1968 missed the message. His call was to deal with inner city protests and riots, which were associated with African American communities.¹⁴⁷

Some Republicans have trouble admitting that conservative icon Ronald Reagan used similar dog whistles.¹⁴⁸ However, his appeal to racial stereotypes cannot be denied.¹⁴⁹ Reagan’s choice to speak at the Neshoba County Fair in 1980 was no random choice; nor was his endorsement of states’ rights.¹⁵⁰ For those too young to remember, Neshoba County was where Klansmen killed three civil rights workers in 1964.¹⁵¹

As I have summarized elsewhere, Reagan often used coded racial language to advance his policies:

Like Nixon, Reagan did not use overtly racist language, relying instead on the increasingly common dog whistle. The most famous example is Reagan’s portrayal of

¹⁴⁵ See, e.g., Terence McArdele, *The ‘Law and Order’ Campaign that Won Richard Nixon the White House 50 Years Ago*, WASHINGTON POST (Nov. 5. 2018, 4:00 AM), <https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Adam Nagourney, *Was Reagan a Precursor to Trump? A New Documentary Says Yes*, NY TIMES (Nov. 11, 2020), <https://www.nytimes.com/2020/11/11/arts/television/the-reagans.html>.

¹⁴⁹ See generally Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUSTICE 273–312 (2010); see also Leland Ware & David C. Wilson, *Jim Crow on the “Down Low”*: *Subtle Racial Appeals in Presidential Campaigns*, 24 CIVIL RIGHTS & ECONOMIC DEVELOPMENT J 299–342 (2008).

¹⁵⁰ Jaime Fuller, *What the Neshoba County Fair Says About Southern Politics*, WASHINGTON POST (Jul. 31, 2017, 4:00 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/07/31/what-the-neshoba-county-fair-says-about-southern-politics/>; see also Peniel E. Joseph, *From Ronald Reagan in Philadelphia, Miss., to Donald Trump in Tulsa, a Pattern of Racially Divisive Politics*, WASHINGTON POST (Jun. 19, 2020, 1:31 PM), <https://www.washingtonpost.com/nation/2020/06/19/ronald-reagan-philadelphia-miss-donald-trump-tulsa-pattern-racially-divisive-politics/>.

¹⁵¹ See, e.g., *American Experience: Murder in Mississippi*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/freedomssummer-murder/>.

Linda Taylor, the infamous “Welfare Queen,” as a symbol of the failed welfare state. Although Taylor’s racial identity was somewhat uncertain, no one missed the intended stereotype of the “indolent black woman, living off the largesse of taxpayers.” Reagan’s War on Drugs demonstrated a similar racial theme. Turning away from drug treatment and towards incarceration was made more palatable by targeting crack cocaine. Who could object to criminalizing mothers who gave birth to crack-addicted babies? Indeed, who could resist increasing punishment for crack cocaine well beyond punishment for powdered cocaine in light of crack’s highly addictive quality?¹⁵²

Of course, crack cocaine was no more addictive than powdered cocaine, the form of choice that many white users preferred. So too were claims of crack babies exaggerated.¹⁵³

Back in the day, some prominent Republicans rejected racist appeals. Republican Governors George Romney and Nelson Rockefeller and Republican Senators like Chuck Percy, Mark Hatfield, and Ed Brooke pushed back against the push to the right in their party.¹⁵⁴ Today,

¹⁵² Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 803-804 (2019).

¹⁵³ *Id.* at 804. Be clear, many Democrats share blame for the excessive sentences that resulted from Reagan’s War on Drugs. Also, some Democrats, notably Bill Clinton, share blame for dog whistle politics.

¹⁵⁴ Maeve Reston, *Aggressive Civil-Rights Stance Left Romney’s Father at Odds With Party*, THE SEATTLE TIMES (July 10, 2012, 9:00 PM), <https://www.seattletimes.com/nation-world/aggressive-civil-rights-stance-left-romneys-father-at-odds-with-party/> (describing how former Romney supporters expressed strong disapproval after Romney, then Governor of Michigan, marched in an anti-segregation demonstration); Richard Norton Smith, *Nelson Rockefeller’s Last Stand: the 1964 Republican National Convention and the Fall of the Party’s Moderates*, POLITICO (Oct. 21, 2014), <https://www.politico.com/magazine/story/2014/10/nelson-rockefellers-last-stand-112072> (explaining how Nelson Rockefeller was “denounced as a party wrecker” after giving a speech denouncing political extremism); Rupert Cornwell, *Charles Percy: Politician Hailed Early in his Career as the Republicans’ Answer to John F. Kennedy*, INDEPENDENT (Sept. 22, 2011), <https://www.independent.co.uk/news/obituaries/charles-percy-politician-hailed-early-in-his-career-as-the-republicans-answer-to-john-f-kennedy-2358670.html> (outlining moderate Charles Percy’s divergence from the rest of his party); Kim Murphy, *Mark O. Hatfield: Longtime Oregon Senator was Bedrock of Moderate Republicanism*, L.A. TIMES (Mar. 17, 2014, 8:33 PM), <https://www.latimes.com/local/obituaries/la-me-mark-hatfield-20110808-story.html> (recounting former Senator Hatfield’s career as a moderate Republican); Edward Brooke, *First Black Elected Senator, Dies at 95*, POLITICO (Jan. 3, 2015, 5:20 PM), <https://www.politico.com/story/2015/01/edward-brooke-obituary-113946> (explaining how, despite being a Republican, Brooke earned his reputation as a Senate liberal).

one can find few similar examples in Congress.¹⁵⁵ Yes, a few Republican governors in blue states have broad support.¹⁵⁶ They have little influence in the national party.¹⁵⁷

Even Mitt Romney, whose father appealed to African Americans, used dog whistles during his 2012 presidential campaign.¹⁵⁸ Notoriously, he complained that 47% of the electorate were lazy moochers, dependent on the government.¹⁵⁹ He contended that the 47% saw themselves as victims.¹⁶⁰ He ran ads focusing on President Obama's rejection of President Clinton's welfare reforms.¹⁶¹ Despite the reality that most welfare recipients are white, that is not the common perception of welfare.¹⁶² Also, Romney was attempting to take advantage of the hostility to Obama policy initiative that many like Mitch McConnell were able to gin up.¹⁶³

¹⁵⁵ See, e.g., Edward-Isaac Dove, *What Republican Senators Say in Private* (Sept. 19, 2020, 6:08 PM), <https://www.theatlantic.com/politics/archive/2020/09/senate-republicans-supreme-court-vacancy/616415/> (discussing current Republican Senators' typical acquiescence to the greater Republican agenda and using the recent Supreme Court vacancy as an example).

¹⁵⁶ See Jennifer Steinhauer, *Republican Governors in Blue States Find a Way to Get Along*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/us/politics/republican-governors-democratic-states.html> (explaining how Republican governors in blue states, namely Larry Hogan, Charlie Baker, and Phil Scott, have garnered broad bipartisan support throughout their bids as governor of Maryland, Massachusetts, and Vermont, respectively).

¹⁵⁷ See Parker Richards, *The Last Liberal Republicans Hang On*, THE ATLANTIC (Nov. 3, 2018), <https://www.theatlantic.com/politics/archive/2018/11/republican-governors-new-england-defy-blue-wave/574726/> (explaining how Governors Charlie Baker and Phil Scott are "oddities in the Republican Party of Donald Trump).

¹⁵⁸ See, e.g., Jonathan Riehl, *Who Hears the Dog Whistle?*, POLITICO (Sept. 5, 2012, 4:31 AM), <https://www.politico.com/story/2012/09/who-hears-the-dog-whistle-080677>.

¹⁵⁹ Annie-Rose Strasser, *Romney Tells Wealthy Donors That 47% of Americans Are Lazy Moochers*, THINKPROGRESS (Sept. 17, 2012, 8:57 PM), <https://archive.thinkprogress.org/romney-tells-wealthy-donors-that-47-of-americans-are-lazy-moochers-24ca784c67c4/>.

¹⁶⁰ See *id.*

¹⁶¹ STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* (2020).

¹⁶² *Id.*

¹⁶³ *Id.*

In context, Trump's racism is overt.¹⁶⁴ But it is not aberrational. Many in the Republican Party share his views but want them to be kept out of sight. They want to count on the votes of the far right, including avowed racists, without acknowledging them.¹⁶⁵

Other Trump policy provisions also reflect mainstream Republican priorities. Justice Ginsburg's death brought front and center the Republicans' shameless indifference to political norms.¹⁶⁶ After making up a rule that the Senate would not consider a nominee for the Supreme Court in an election year, McConnell and his colleagues did an about-face.¹⁶⁷ Lindsay Graham's 2016 vow to apply the same standard even if a Republican President had an opportunity to appoint a new justice did not stop his about-face.¹⁶⁸ As developed below, Trump's record on judicial appointments dovetails with the right wing's long-term strategy.¹⁶⁹ No wonder McConnell crowed about his success in frustrating Obama from appointing judges and Trump and McConnell crowed about their accomplishments in appointing hundreds of federal judges.¹⁷⁰

Because of McConnell's success in preventing Obama from appointing Justice Scalia's successor and in ramming through Amy Coney Barrett,¹⁷¹ Trump may succeed in fulfilling a

¹⁶⁴ See, e.g., German Lopez, *Donald Trump's Long History of Racism, from the 1970s to 2020*, VOX (Aug. 13, 2020, 7:00 PM), <https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history>.

¹⁶⁵ Ishaan Tharoor, *Trump's Racism Cements His Party's Place Among the West's Far Right*, WASHINGTON POST (Jul. 15, 2019, 8:59 PM), <https://www.washingtonpost.com/world/2019/07/16/trumps-racism-cements-his-partys-place-among-wests-far-right/>.

¹⁶⁶ See Peter Baker, *In Swearing in Barrett, Trump Defiantly Mimics 'Superspreader' Rose Garden Ceremony*, N.Y. TIMES (Oct. 26, 2020, 6:21 PM), <https://www.nytimes.com/2020/10/26/us/politics/trump-barrett.html> (describing Trump's rejection of social and political norms with his quick confirmation of now-Justice Amy Coney Barrett and his multiple events celebrating the victory despite the ongoing pandemic).

¹⁶⁷ See Lissandra Villa, *Here's What GOP Senators Said About the 2016 Supreme Court Vacancy – And What They're Saying Now*, TIME (Sept. 24, 2020, 4:06 PM), <https://time.com/5892574/senate-republicans-supreme-court-vote/>.

¹⁶⁸ See *id.*

¹⁶⁹ *Infra* Part III.

¹⁷⁰ See Priyanka Boghani, *How McConnell and the Senate Helped Trump Set Records in Appointing Judges*, FRONTLINE (May 21, 2019), <https://www.pbs.org/wgbh/frontline/article/how-mcconnell-and-the-senate-helped-trump-set-records-in-appointing-judges/>.

¹⁷¹ *Id.*; see also Carl Hulse, *How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation*, N.Y. TIMES (Oct. 27, 2020, 9:08 PM), <https://www.nytimes.com/2020/10/27/us/mcconnell-barrett-confirmation.html>.

promise that Republican Presidents dating back to Ronald Reagan have not been able to achieve: overruling *Roe v. Wade*.¹⁷² Two of Reagan’s appointees to the Court, Sandra Day O’Connor, and Anthony Kennedy, helped narrow *Roe*, but kept it in place.¹⁷³ Similarly, the first President Bush’s appointee David Souter joined O’Connor and Kennedy in upholding *Roe*.¹⁷⁴ Even Chief Justice John Roberts shied away from overruling recent precedent that would have further impaired *Roe* during the 2019 term of the Court.¹⁷⁵ With Justice Ginsburg’s death and the appointment of Judge Barrett, even Chief Justice Roberts’ concern about adherence to precedent may not matter.¹⁷⁶

Overseeing the federal judiciary’s hard turn to the right is hardly the only area in which Trump and the Republicans share policy preferences. American politics demonstrate many ironies. One is that Americans usually believe that Republicans are better managers of the American economy.¹⁷⁷ Despite that, Democrats have a much better track record than do Republicans.¹⁷⁸ That track record is long-standing, whether measured by economic growth or the

¹⁷² See Linda Greenhouse, *Reagan Administration Renews Assault on 1973 Abortion Ruling*, N.Y. TIMES (Nov. 11, 1988), <https://www.nytimes.com/1988/11/11/us/reagan-administration-renews-assault-on-1973-abortion-ruling.html> (detailing the Reagan administration’s push to convince the court to take a case that would present the opportunity to overrule *Roe v. Wade*).

¹⁷³ See Robert Barnes, *The Last Time the Supreme Court was Invited to Overturn Roe v. Wade, a Surprising Majority was Unwilling*, WASHINGTON POST (May 29, 2019, 7:28 PM), https://www.washingtonpost.com/politics/courts_law/the-last-time-the-supreme-court-was-invited-to-overturn-roe-v-wade-a-surprising-majority-was-unwilling/2019/05/29/2cd37b30-7b39-11e9-8bb7-0fc796cf2ec0_story.html%3foutputType=amp (describing the surprising decision of Justices O’Connor, Kennedy, and Souter to uphold *Roe v. Wade* in the later case *Planned Parenthood of Southeastern Pennsylvania v. Casey*).

¹⁷⁴ See *id.*

¹⁷⁵ *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103, 2133-42 (2020) (Roberts, C.J., concurring).

¹⁷⁶ Because of his concerns about the reputation of the Court, the Chief Justice has at times shown a willingness to defer advancing his agenda in favor of protecting the Court by adhering to precedent or to decide cases like *Sibelius*. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). There, for example, while voting to uphold Obamacare, he wrote an opinion that invites erosion of some of the Court’s expansive Commerce Clause case law. The addition of Justice Barrett means that the rightwing of the Court has five votes, even if that bloc loses Roberts’ vote.

¹⁷⁷ STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* (2020).

¹⁷⁸ See Jere Glove, *Trump is Right About One Thing: The Economy Does ‘Better Under the Democrats,’* FORBES (Nov. 7, 2016, 10:28 PM), <https://www.forbes.com/sites/realspin/2016/11/07/trump-is-right-about-one-thing-the-economy-does-better-under-the-democrats/?sh=28d85bfe6786> (agreeing with Donald Trump’s 2004 statement that “the economy does better under the Democrats than the Republicans”).

size of the deficit.¹⁷⁹ Dating back to Reagan’s presidency, Republicans have claimed that tax cuts are the remedy for almost any problem faced in the United States.¹⁸⁰

The sharp increase in income inequity began with Reagan’s restricting of tax rates.¹⁸¹ Despite inheriting a surplus, George W. Bush, who lost the popular vote in 2000, pushed through a tax cut, largely benefitting the wealthiest Americans.¹⁸² Amazingly, despite strong evidence to the contrary, Republicans have claimed that tax cuts pay for themselves.¹⁸³ Trump’s “greatest” accomplishment was yet another massive tax cut for the wealthiest Americans.¹⁸⁴ Remarkably silent were deficit hawks in the Republican Party.¹⁸⁵

The long-term effects of Trump’s tax cuts may be the need to cut safety net protections.¹⁸⁶ Despite Trump’s promises to main Social Security, his tax policy may endanger

¹⁷⁹ *See id.*

¹⁸⁰ *See How Tax Cuts Became Central to the Republican Party*, RUSSELL SAGE FOUNDATION (Mar. 7, 2016), <https://www.russellsage.org/news/how-tax-cuts-became-central-republican-party> (explaining how tax cuts have been an important part of the Republican agenda since Ronald Reagan’s presidency).

¹⁸¹ *See* Tim Worstall, *Krugman’s Right, Reagan’s Tax Changes Increased Inequality – They Were Meant to as Well*, FORBES (Aug. 21, 2017, 9:54 AM), <https://www.forbes.com/sites/timworstall/2017/08/21/krugmans-right-reagans-tax-changes-increased-inequality-they-were-meant-to-as-well/?sh=621f80ce499d>.

¹⁸² *See* Emily Horton, *The Legacy of the 2001 and 2003 “Bush” Tax Cuts*, CENTER ON BUDGET AND POLICY PRIORITIES (Oct. 23, 2017), <https://www.cbpp.org/research/federal-tax/the-legacy-of-the-2001-and-2003-bush-tax-cuts> (offering general information about the Bush tax cuts).

¹⁸³ *See, e.g.*, William G. Gale, *Did the 2017 Tax Cut – the Tax Cuts and Jobs Act – Pay for Itself?*, BROOKINGS (Feb. 14, 2020), <https://www.brookings.edu/policy2020/votervital/did-the-2017-tax-cut-the-tax-cuts-and-jobs-act-pay-for-itself/> (explaining that the 2017 Trump administration tax cuts did not, and likely will not, pay for themselves, despite claims to the contrary).

¹⁸⁴ *See* Dominic Rushe, *Trump’s Tax Cuts Helped Billionaires Pay Less Than the Working Class for First Time*, THE GUARDIAN (Oct. 9, 2019, 11:51 AM), <https://www.theguardian.com/business/2019/oct/09/trump-tax-cuts-helped-billionaires-pay-less>.

¹⁸⁵ *See* Paul Krugman, *Return of the Phony Deficit Hawks*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/opinion/coronavirus-stimulus-deficit.html> (asserting that “Republicans had no problem with rising deficits during the pre-pandemic Trump years; they cheerfully passed a \$1.9 trillion tax cut, mainly for corporations and the wealthy”).

¹⁸⁶ *See generally* Seth Hanlon et al., *Trump’s Budget Reveals That He Wants Everyday Americans to Pay for His Tax Cuts for the Wealthy*, CENTER FOR AMERICAN PROGRESS (Feb. 12, 2018, 5:30 PM), <https://www.americanprogress.org/issues/economy/news/2018/02/12/446453/trumps-budget-reveals-wants-everyday-americans-pay-tax-cuts-wealthy/> (describing how Trump’s budget and tax cuts may lead to cutting various programs including the Supplemental Nutrition Assistance Program, public housing programs, and Social Security).

such programs.¹⁸⁷ Economists have expressed surprise that the increased deficit has not led to inflation.¹⁸⁸ If it does, cutting government spending may be a necessary response.¹⁸⁹ Not often discussed is the view of those on the far-right that bloating the deficit will force cuts to programs even as valued as are Social Security and Medicare.¹⁹⁰ Notable far-right economic libertarians have long argued that such programs are immoral.¹⁹¹ As several recent books have demonstrated, the Koch brothers have played the long game, dating back to the 1950s, establishing right wing thinktanks designed to make their extreme views appear mainstream.¹⁹² While news reports suggested that the Koch brothers opposed Trump, as they surely did on tariffs and closing the border to immigrant cheap labor, many of Trump's policies advanced their extremist policies.¹⁹³ Trump's conduct in exploding the deficit may result in advancing such rightwing policies as cutting Social Security and Medicare.¹⁹⁴ But the overlap of far-right policy positions and the

¹⁸⁷ See Paul N. Van de Water, *Trump Payroll Tax Action Won't Work, Could Endanger Social Security and Budget*, CENTER ON BUDGET AND POLICY PRIORITIES (Aug. 13, 2020, 12:00 PM), <https://www.cbpp.org/blog/trump-payroll-tax-action-wont-work-could-endanger-social-security-and-budget> (explaining how Trump's tax cuts and additional plans could endanger Social Security).

¹⁸⁸ Sylvan Lane, *Top Fed Official Sees Low Inflation Running Through 2022*, THE HILL (Feb. 17, 2021, 11:31 AM EST), <https://thehill.com/policy/finance/539203-top-fed-official-sees-low-inflation-running-through-2022>.

¹⁸⁹ Leslie Kramer, *How Do Governments Reduce Inflation?*, INVESTOPEDIA (Jan. 22, 2021), <https://www.investopedia.com/ask/answers/111314/what-methods-can-government-use-control-inflation.asp#:~:text=It%20also%20means%20there%20is,turn%2C%20the%20rate%20of%20inflation.&text=When%20the%20Federal%20Reserve%20increases,increase%20their%20rates%20as%20well>.

¹⁹⁰ Mark Miller, *Social Security and the U.S. Deficit: Separating Fact from Fiction*, REUTERS (Nov. 1, 2018, 2:15 AM), <https://www.reuters.com/article/us-column-miller-socialsecurity/social-security-and-the-u-s-deficit-separating-fact-from-fiction-idUSKCN1N64GR>.

¹⁹¹ Robert Greenwald, *The Koch Brothers' Campaign to Kill Social Security*, THE GUARDIAN, <https://www.theguardian.com/commentisfree/cifamerica/2011/jun/22/koch-brothers-social-security> (last visited Feb. 26, 2021); see also NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* (2017).

¹⁹² NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* (2017); see also STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* (2020).

¹⁹³ Brian Schwartz, *Conservative Billionaire Koch Brothers' Network Denounces Trump's Tariffs on EU, Canada and Mexico*, CNBC (May 31, 2018, 10:38 AM EDT), <https://www.cnn.com/2018/05/31/conservative-koch-brothers-network-denounces-trump-tariffs.html>.

¹⁹⁴ Jeff Stein & Erica Werner, *Trump Proposes \$4.8 Trillion Election-Year Budget with Big Domestic Cuts*, WASHINGTON POST (Feb. 10, 2020, 9:28 AM), <https://www.washingtonpost.com/business/2020/02/09/trump-budget-plan-would-fail-eliminate-deficit-over-10-years-briefing-document-shows/>.

Republican Party should surprise no one. Charles Koch and other far-right advocates are at home in the current Republican Party.¹⁹⁵

There is more. What about climate change and environmental protection? Trump is a climate-change-denier.¹⁹⁶ For example, during Trump’s visit to California to assess fire damage, Governor Gavin Newsom pushed Trump to acknowledge climate change and its role in wildfires.¹⁹⁷ Trump’s response was, “I don’t think science knows” what is happening.¹⁹⁸ When Wade Crowfoot, California’s secretary for natural resources, warned of continuing problems created by a warming planet, Trump shot back, “It’ll start getting cooler. You just watch.”¹⁹⁹

In 2016, Trump appealed to voters in coal producing states by promising renewed use of coal and other fossil fuels.²⁰⁰ He targeted the Environmental Protection Agency as part of the problem.²⁰¹

¹⁹⁵ See Alexander Hertel-Fernandez & Theda Skocpol, *Five Myths About the Koch Brothers – And Why it Matters to Set them Straight*, MOYERS ON DEMOCRACY (Mar. 10, 2016), <https://billmoyers.com/story/five-myths-about-the-koch-network-and-why-it-matters-to-set-them-straight/>. One ought to remember, for example, that George W. Bush failed in advancing privatization of Social Security, a position advanced by the far-right.

¹⁹⁶ See Michael D. Shear & Coral Davenport, *In Visiting a Charred California, Trump Confronts a Scientific Reality He Denies*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/09/13/us/politics/california-fires-trump-climate-change.html> (explaining how Trump and his environmental officials have “mocked, denied, or minimized” climate change).

¹⁹⁷ Reuters, *‘Climate Change is Real,’ Newsom Tells Trump at Briefing*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/video/us/politics/100000007339667/trump-california-wildfires.html>.

¹⁹⁸ Peter Baker, Lisa Friedman, & Thomas Kaplan, *As Trump Again Rejects Science, Biden Calls Him a ‘Climate Arsonist’*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/09/14/us/politics/trump-biden-climate-change-fires.html>.

¹⁹⁹ *Id.*

²⁰⁰ See Coral Davenport, *Donald Trump, in Pittsburgh, Pledges to Boost Both Coal and Gas*, N.Y. TIMES (Sept. 22, 2016), <https://www.nytimes.com/2016/09/23/us/politics/donald-trump-fracking.html> (describing Trump’s promises regarding coal renewal to Pittsburgh, “once synonymous with the rich coal seam that runs beneath it”).

²⁰¹ See Brady Dennis, *Trump Taps Climate-Change Skeptic to Oversee EPA Transition*, WASHINGTON POST (Nov. 11, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/11/11/meet-the-man-trump-is-relying-on-to-unravel-obamas-environmental-legacy/> (recounting Trump’s disdain for the EPA and his efforts to remove rules imposed on the fossil fuels industry).

Older Americans may remember environmental problems the United States faced before the creation of the Environmental Protection Agency (EPA).²⁰² Many major cities had choking air pollution.²⁰³ Many Americans faced risks to their clean water supply. In the 1960s and 1970s, politicians from both political parties advocated for federal environmental legislation.²⁰⁴

“Conservative” President Richard Nixon created the EPA even before Congress enacted legislation to establish the agency.²⁰⁵ The EPA’s jobs include environmental assessment, research and education.²⁰⁶ The agency has the authority to create regulations and to enforce them, even criminally.²⁰⁷ Its staff, even with recent efforts by the Republican Party to curtail EPA power, exceeds 14,000 employees.²⁰⁸ Many of those are engineers, scientists and environmental specialists.²⁰⁹

For most of its history, the EPA has earned the support of nearly all Americans.²¹⁰ It has helped improve air and water quality, and its scientists have had authorization to follow good

²⁰² See Brian Palmer, *Why We Need the EPA*, NATURAL RESOURCES DEFENSE COUNCIL (Feb. 14, 2017), <https://www.nrdc.org/stories/why-we-need-epa>.

²⁰³ *Id.*

²⁰⁴ See Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, THE ATLANTIC (Mar. 29, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/> (explaining how President Nixon, together with a Democratic Congress, worked to establish environmental legislation).

²⁰⁵ See generally *The Origins of EPA*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/history/origins-epa> (describing how the EPA was created).

²⁰⁶ See generally *Our Mission and What We Do*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do>.

²⁰⁷ See *id.* See also *Criminal Enforcement Overview*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/enforcement/criminal-enforcement-overview>.

²⁰⁸ *What Kind of People Work at EPA?*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/careers/what-kind-people-work-epa>.

²⁰⁹ See *id.*

²¹⁰ See Meyer, *supra* note 204.

scientific practices and to prepare scientifically sound reports.²¹¹ Importantly, the agency also appropriately weighed in on climate change.²¹²

Large percentages of Americans support the agency.²¹³ At one point, the overwhelming percentage of Americans recognized the reality of climate change, global warming and the risks to the sustainability of our planet.²¹⁴ In the past decade, climate change has become a divisive political issue.²¹⁵ The Republican Party deserves much of the blame for making it a divisive issue and for an increasing distrust of science among their most ardent supporters.²¹⁶

Many business interests have opposed regulations generally and have targeted the EPA.²¹⁷ Several well-researched books have chronicled the switch in the politics of the Republican Party.²¹⁸ Right-wing libertarian executives, think tanks, and other organizations have

²¹¹ *See id.*

²¹² *See generally Environmental Protection Agency*, GLOBAL CHANGE, <https://www.globalchange.gov/agency/environmental-protection-agency> (offering general information about the EPA's research about climate change).

²¹³ *See Meyer, supra* note 204.

²¹⁴ *See Melissa De Witte, Public Support for Climate Policy Remains Strong*, STANFORD EARTH (July 15, 2018), <https://earth.stanford.edu/news/public-support-climate-policy-remains-strong#gs.os644d> (illustrating wide public support for climate policy through various different measurements).

²¹⁵ *See Cary Funk & Meg Hefferon, U.S. Public Views on Climate and Energy*, PEW RESEARCH CENTER (Nov. 25, 2019), <https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy/> (measuring the difference in support for climate policy between democrats and republicans).

²¹⁶ Marc Hetherington & Jonathan M. Ladd, *Destroying Trust in the Media, Science, and Government has Left America Vulnerable to Disaster*, BROOKINGS (May 1, 2020), <https://www.brookings.edu/blog/fixgov/2020/05/01/destroying-trust-in-the-media-science-and-government-has-left-america-vulnerable-to-disaster/> (describing efforts by the Republican Party, and Donald Trump, to reduce the nation's trust in science and the media).

²¹⁷ *See Industry Opposition to Government Regulation*, THE PEW ENVIRONMENT GROUP (Oct. 2010), <https://www.pewtrusts.org/~media/assets/2011/03/industry-clean-energy-factsheet.pdf> (reviewing instances where various industries have opposed environmental regulations).

²¹⁸ Jane Mayer, *Dark Money* and Nancy MacLean, *Democracy in Chains*, are only two books detailing the influence of the rightwing on American politics, most notably, on the Republican Party.

worked hard to change the regulatory climate in the United States.²¹⁹ Individuals like Charles and the late David Koch spent many millions of dollars to influence the Republican Party.²²⁰

This process began well before the Trump election.²²¹ Although some Americans tend to forget, George W. Bush advanced many extreme rightwing positions during his presidency.²²² The trend hastened after Barack Obama's election.²²³ The rise of the Tea Party in the United States is falsely portrayed as a grassroots movement.²²⁴ For example, the Koch brothers' money boosted the organization.²²⁵

Trump's environmental policy dovetails with the anti-science and anti-EPA drumbeat of the far-right.²²⁶ Some of those steps have included limiting EPA scientists from publishing their

²¹⁹ See James Jacoby, Anya Bourg, & Frank Koughan, *The War on the EPA*, PBS: FRONTLINE (Oct. 11, 2017), <https://www.pbs.org/wgbh/frontline/film/war-on-the-epa/> (offering examples of conservatives who are unhappy with the EPA's regulatory scheme).

²²⁰ See *id.* See also Jane Mayer, "Kochland" Examines the Koch Brothers' Early, Crucial Role in Climate Change Denial, THE NEW YORKER (Aug. 13, 2019), <https://www.newyorker.com/news/daily-comment/kochland-examines-how-the-koch-brothers-made-their-fortune-and-the-influence-it-bought>.

²²¹ See Hetherington & Ladd, *supra* note 216 (explaining that the conservatives' effort to undermine the American people's trust in media and science began at least 50 years before Donald Trump took office).

²²² See generally Douglas Kellner, *Bushspeak and the Politics of Lying: Presidential Rhetoric in the "War on Terror,"* 37 PRESIDENTIAL STUDIES QUARTERLY 622 (2007) (analyzing how the Bush administration advanced a right-wing agenda with the use of rhetoric and the U.S. media).

²²³ See Dominic Tierney, *Is Trump Obama's Dark Doppelgänger*, THE ATLANTIC (Mar. 17, 2016), <https://www.theatlantic.com/politics/archive/2016/03/is-trump-obamas-doppelganger/474108/> (explaining how presidents in recent history have spurred alter egos; the rise of Trump after Obama's presidency was no exception).

²²⁴ See Jeff Nisbit, *The Secret Origins of the Tea Party*, TIME, <https://time.com/secret-origins-of-the-tea-party/> (describing the origins of the Tea Party).

²²⁵ Tim Mak, *Koch Brothers, Behind Tea Party Wave, Face Democrats' Rising Tide in 2018*, NPR (Jan. 30, 2018, 5:00 AM), <https://www.npr.org/2018/01/30/581730998/koch-brothers-behind-tea-party-wave-face-democrats-rising-tide-in-2018>).

²²⁶ Brad Plumer & Coral Davenport, *Science Under Attack: How Trump Is Sidelining Researchers and Their Work*, NY TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/climate/trump-administration-war-on-science.html>.

reports,²²⁷ curtailing gas mileage standards,²²⁸ changing air quality standards to allow greater use of coal, despite its high CO2 emissions,²²⁹ and slashing the agency's budget.²³⁰

While most Americans still believe that climate change is manmade and that environmental protection remains a priority, mainstream Republican members of Congress have demonstrated their willingness to flout science and to adhere to the extremist views of right-wing organizations.²³¹ They had a strong ally in Trump.²³²

Many of the Republicans who oppose Trump or who have abandoned the party believe in many of the positions that the party used to advance.²³³ As mentioned above, at one point, Republicans were environmentalists.²³⁴ Before Reagan was able to mobilize the religious right around overruling *Roe*, many Republicans favored abortion rights.²³⁵ Many Republicans joined

²²⁷ Romany Webb, Lauren Kurtz, & Susan Rosenthal, *When Politics Trump Science: The Erosion of Science-Based Regulation*, 50 ENVTL. L. REP. 10,708-09 (2020),

<https://climate.law.columbia.edu/sites/default/files/content/Webb%20et%20al.%20--%20When%20Politics%20Trump%20Science%20--%20Sept.%202020.pdf>.

²²⁸ See Juliet Eilperin & Brady Dennis, *Trump Administration to Finalize Weaker Mileage Standards, Dealing a Blow to Obama-Era Climate Policy*, WASHINGTON POST (Mar. 31, 2020),

<https://www.washingtonpost.com/health/2020/03/30/trump-mileage-standards-environment/%3foutputType=amp> (outlining the Trump administration's plan to decrease the annual improvement required for cars and pickup trucks from the Obama administration's rate of almost 5% to a mere 1.5%).

²²⁹ See Samantha Gross, *What is the Trump Administration's Track Record on the Environment*, BROOKINGS (Aug. 4, 2020), <https://www.brookings.edu/policy2020/votervital/what-is-the-trump-administrations-track-record-on-the-environment/> (explaining how the Trump administration has made efforts to boost fossil fuel production and use).

²³⁰ Webb, Kurtz, & Rosenthal, *supra* note 231, at 10,711.

²³¹ See, e.g., Sally Hardin & Claire Moser, *Climate Deniers in the 116th Congress*, CENTER FOR AMERICAN PROGRESS ACTION FUND (Jan. 28, 2019, 9:00 AM),

<https://www.americanprogressaction.org/issues/green/news/2019/01/28/172944/climate-deniers-116th-congress/> (reporting that as many as 150 Republican members of the 116th Congress did not believe that human activity is causing the climate to change).

²³² See Shear & Davenport, *supra* note 200 (explaining how Trump and his environmental officials have “mocked, denied, or minimized” climate change).

²³³ See, e.g., *Our Stories*, REPUBLICAN VOTERS AGAINST TRUMP, <https://rvat.org/#homePageStories> (showing stories of Republicans and former Republicans who reliably supported the party but are “disgusted by the Trump administration”).

²³⁴ See, e.g., *The Origins of EPA*, *supra* note 209 (explaining how Republican president Richard Nixon created the EPA).

²³⁵ See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L. J. 2028, 2031 (2011) (relying on a poll taken prior to *Roe* that showed 68% of Republicans believed abortion should be a decision between a woman and her doctor). Additionally, the *Roe v. Wade* majority opinion

efforts to expand civil rights, back when they could say with a straight face that they belonged to the party of Lincoln.²³⁶ But their narrative that they left the party or opposed Trump because he was an aberration ignores many areas where Trump advanced policies that part of the Republican agenda were long before he was elected in 2016.²³⁷

Part II: The Republicans Move to the Right; the Democrats Move to the Left: A Familiar Trope

To hear Mitch McConnell, the Republican Presidents have nominated mainstream judges to the federal courts while Democrats would appoint judges outside the mainstream.²³⁸ During the 2020 presidential election campaign, Trump and many Republicans tried to portray candidate Biden as under the influence of the extreme leftwing of the Democratic Party.²³⁹ Of course, Democrats have portrayed Republicans as moving far to the right of center.²⁴⁰

was penned by Nixon appointee Justice Harry Blackmun and joined by Republican appointees including Justices Burger, Brennan, Stewart, Blackmun, and Powell.

²³⁶ See *The Civil Rights Movement and the Second Reconstruction, 1945-1968*, HISTORY, ART & ARCHIVES: BLACK AMERICANS IN CONGRESS, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/> (offering examples of Republicans working to expand civil rights, including the 138 House Republicans who helped to pass the Civil Rights Act of 1964).

²³⁷ See Jamelle Bouie, *Don't Fool Yourself. Trump is Not an Aberration*, N.Y. TIMES (Oct. 30, 2020, 7:55 PM), <https://www.nytimes.com/2020/10/30/opinion/trump-presidents-history.html?login=email&auth=login-email&login=email&auth=login-email> (asserting that Trump has merely been perpetuating policies and ideas that have persisted throughout Republican history).

²³⁸ See Chris Cioffi, *The GOP Is Confirming Trump Judicial Nominees It Stalled Under Obama*, ROLL CALL (Aug. 26, 2019 5:30 AM), <https://www.rollcall.com/2019/08/26/the-gop-is-confirming-trump-judicial-nominees-it-stalled-under-obama/>.

²³⁹ Dan Balz, *Trump and Republicans Attack Biden as Tool of the Left, Agent of Socialism*, WASHINGTON POST (Aug. 24, 2020 8:29 PM), https://www.washingtonpost.com/politics/biden-attacks-republican-convention/2020/08/24/434e5b46-e66d-11ea-970a-64c73a1c2392_story.html; David Smith, *Trump's 2020 Strategy: Paint Joe Biden as a Puppet for the 'Radical Left'*, GUARDIAN (July 19, 2020), <https://www.theguardian.com/us-news/2020/jul/19/trump-2020-joe-biden-extreme-left>. See also Rebecca Shabad, *Trump Claims Without Evidence that Biden Controlled by People in 'the Dark Shadows'*, NBC NEWS (Sept. 1, 2020), <https://www.nbcnews.com/politics/2020-election/trump-claims-without-evidence-biden-controlled-people-dark-shadows-n1238953> (President Trump alleged in an interview with conservative talk-show host Laura Ingraham that Joe Biden was being controlled by "people that you've never heard of, people that are in the dark shadows... People that you haven't heard of. They're people that are on the streets, they're people that are controlling the streets.")

²⁴⁰ See generally GEOFFREY KABASERVICE, *RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY* (Oxford University Press, 2013)

Many Americans who consider themselves centrists often incant a familiar trope: The Republicans have moved to the right and the Democrats have moved to the left.²⁴¹ For some centrists, that trope could give them a reason not to vote.²⁴² For others, they cite that as a reason to vote for Republicans, including Trump, on the theory that the Democratic Party is dangerous for America.²⁴³ As Republicans tried to portray Democrats in the recent election cycle, a Democratic victory would usher in socialism.²⁴⁴ The trope is true in part: The Republican Party has veered sharply to the right. In effect, it has become the captive of the far-right wing, heavily influenced by the extreme economic libertarian Republican benefactors, including Charles Koch and other extremists.²⁴⁵

While some commentators argue that the United States no longer has a political center,²⁴⁶ as developed in this section, the Democratic Party is much closer to the views of a majority of Americans on almost every important policy question at stake in this election and even the not-so-recent past. Given that the Democratic Party has a significantly larger membership than does

²⁴¹ See Chris Cillizza, *Half of Americans Think the Democratic Party Has Moved Too Far Left*, CNN (Oct. 24, 2019), <https://www.cnn.com/2019/10/24/politics/democratic-party-left-liberal-q-poll/index.html>. See also PEW RES. CENTER, *The Partisan Divide on Political Values Grows Even Wider 7-9* (2017), <https://assets.pewresearch.org/wp-content/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf> (“The gap between the political values of Democrats and Republicans is now larger than at any point in Pew Research Center surveys dating back to 1994.”).

²⁴² See Kellie L. Harrison, *The Forgotten Center: An Analysis into the Disappearing Moderate in a Climate of Increasing Political Polarization*, 12 INQUIRIES J. 1 (2020), <http://www.inquiriesjournal.com/articles/1796/the-forgotten-center-an-analysis-into-the-disappearing-moderate-in-a-climate-of-increasing-political-polarization>.

²⁴³ See David Smith, *'America v Socialism': Conservatives Rage Against the Left and Plot New Red Scare*, GUARDIAN (Mar. 1, 2020), <https://www.theguardian.com/us-news/2020/mar/01/trump-conservatives-socialism-bernie-sanders-politics>.

²⁴⁴ *Id.*

²⁴⁵ See generally NANCY MCLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* (2017); JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016); KABASERVICE, *supra* note X [5 before this one].

²⁴⁶ E.g., Sahil Chinoy, *What Happened to America's Political Center of Gravity?*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/interactive/2019/06/26/opinion/sunday/republican-platform-far-right.html>; Eric Levitz, *Democrats Can Abandon the Center — Because the Center Doesn't Exist*, N.Y. MAGAZINE (July 30, 2017), <https://nymag.com/intelligencer/2017/07/dems-can-abandon-the-center-because-the-center-doesnt-exist.html>; Sarah A. Binder, *The Disappearing Political Center: Congress and the Incredible Shrinking Middle*, BROOKINGS INST. (Sept. 1, 1996), <https://www.brookings.edu/articles/the-disappearing-political-center-congress-and-the-incredible-shrinking-middle/>.

the Republican Party, one should not be surprised that its policies would be closer to the majority of Americans.²⁴⁷ True, while the Democratic Party includes a few members of Congress who espouse relatively left-wing views, they do not dominate the party.²⁴⁸ For better or worse, given anti-democratic institutions within the United States, including the Senate and Electoral College,²⁴⁹ the Democratic Party has gravitated towards the center to appeal to a broad base of Americans.²⁵⁰

As argued in Part I above, many commentators, including former members of the Republican Party, acknowledge that the party has abandoned many traditional Republican positions and that the seeds were planted long before the era of Trump.²⁵¹ That does not necessarily mean that the Republican Party's major policy positions lack majoritarian support. But they do, as demonstrated in repeated public opinion polls.²⁵² By comparison, on those same policy questions, the positions advanced by Democrats are far closer to the center of Americans' views than are the Republicans' positions.²⁵³

²⁴⁷ John Gramlich, *What the 2020 Electorate Looks Like by Party, Race and Ethnicity, Age, Education and Religion*, PEW RES. CTR. (Oct. 26, 2020), <https://www.pewresearch.org/fact-tank/2020/10/26/what-the-2020-electorate-looks-like-by-party-race-and-ethnicity-age-education-and-religion/> (33% of registered voters identify as Democrats, while 29% identify as Republicans).

²⁴⁸ See Perry Bacon, Jr., *The Six Wings of the Democratic Party*, FIVETHIRTYEIGHT (Mar. 11, 2019), <https://fivethirtyeight.com/features/the-six-wings-of-the-democratic-party/>.

²⁴⁹ See Dan Glickman, *The Electoral College Is a Threat to 21st Century Democracy*, ASPEN INST. (Jan. 4, 2021), <https://www.aspeninstitute.org/blog-posts/the-electoral-college-is-a-threat-to-21st-century-democracy/>; Bruce Bartlett, *The Never-Ending Crisis of the Electoral College*, NEW REPUBLIC (Nov. 12, 2020), <https://newrepublic.com/article/160162/electoral-college-national-popular-vote>.

²⁵⁰ See Part IV *infra*.

²⁵¹ See Part I *supra*.

²⁵² See, e.g. GALLUP, *Abortion* (May 1-13, 2020), <https://news.gallup.com/poll/1576/abortion.aspx> (79% of Americans think abortions should be “legal under any circumstances” or “legal only under certain circumstances”); Katherine Schaeffer, *Share of Americans Who Favor Stricter Gun Laws Has Increased Since 2017*, PEW RES. CENTER (Oct. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/10/16/share-of-americans-who-favor-stricter-gun-laws-has-increased-since-2017/> (60% of Americans say gun laws should be more strict); Justin McCarthy, *In U.S., 71% Support Transgender People Serving in Military*, GALLUP (June 20, 2019), <https://news.gallup.com/poll/258521/support-transgender-people-serving-military.aspx>.

²⁵³ See Elaine Godfrey, *Democrats' Unprecedented Embrace of Gun Control*, ATLANTIC (Aug. 20, 2020), <https://www.theatlantic.com/politics/archive/2020/08/democrats-unprecedented-support-gun-control-dnc/615514/>.

Take low hanging fruit: abortion rights. Since Ronald Reagan courted the religious right, every Republican Presidential candidate has promised to appoint justices to overturn *Roe v. Wade*.²⁵⁴ That promise has kept loyal single-issue voters whose economic interests and views on other cultural issues might otherwise lead them to vote for Democratic candidates.²⁵⁵ Republican candidates for other offices as well have almost always adhered to the anti-abortion plank in the Republican Party platform.²⁵⁶

Democrats have largely shown the flipside of the Republican position. Although some Democrats have urged their fellow party members not to make pro-choice a litmus test,²⁵⁷ Democrats rally around support for *Roe*.²⁵⁸ Indeed, even though, as developed below, Amy Coney Barrett's appointment threatens less visible but perhaps more important policies, Democrats opposing her appointment led with her opposition to *Roe*.²⁵⁹ Support for abortion

²⁵⁴ E.g., Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>; Sarah Kliff, *Romney v. Roe v. Wade*, WASH. POST (Sept. 10, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/09/10/romney-v-roe-v-wade/>; Tom Curry, *Roe v. Wade Makes Campaign Comeback*, NBC NEWS (Aug. 29, 2008), <https://www.nbcnews.com/id/wbna26460555> (McCain and Palin).

²⁵⁵ See Megan Brenan, *One in Four Americans Consider Abortion a Key Voting Issue*, GALLUP (July 7, 2020), <https://news.gallup.com/poll/313316/one-four-americans-consider-abortion-key-voting-issue.aspx>; *Important Issues in the 2020 Election*, PEW RES. CENTER (Aug. 13, 2020), <https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/>. See generally Danielle Kurtzleben, *The Complicated Importance of Abortion to Trump Voters*, NAT'L PUB. RADIO (Sept. 17, 2020), <https://www.npr.org/2020/09/17/913589176/the-complicated-importance-of-abortion-to-trump-voters>.

²⁵⁶ Kristina Peterson, *House Republicans Now Unanimous in Opposing Abortion Rights*, WALL STREET J. (Mar. 21, 2019), <https://www.wsj.com/articles/house-republicans-now-unanimous-in-opposing-abortion-rights-11553172954>.

²⁵⁷ E.g. Kristen Day, Opinion, *Pro-life Democrats Must Stand Up Against Party's Abortion Litmus Test*, THE HILL (Oct. 5, 2017), <https://thehill.com/opinion/civil-rights/354063-pro-life-democrats-must-stand-against-partys-abortion-litmus-test>.

²⁵⁸ See *Abortion Trends by Party Identification*, GALLUP, <https://news.gallup.com/poll/246278/abortion-trends-party.aspx> (last visited Feb. 7, 2021) (Currently, 92% of Democrats think abortion should be legal in some or all circumstances).

²⁵⁹ See Melissa Quinn, Grace Segers & Stefan Becket, *"I Assure You I Have My Own Mind": Democrats Grill Amy Coney Barrett in Hearings*, CBS NEWS (Oct. 15, 2020), <https://www.cbsnews.com/live-updates/amy-coney-barrett-confirmation-hearings-day-3-recap/>; Ariane de Vogue, *Democrats Try to Pin Barrett Down on Roe v. Wade and Abortion Rights*, CNN (Oct. 13, 2020), <https://www.cnn.com/2020/10/13/politics/abortion-amy-coney-barrett-hearing/index.html>.

rights is not only strong among Democrats but among Americans generally.²⁶⁰ Before Reagan captured the anti-abortion, pro-life vote, many Republicans supported abortion rights, including most of the Republican Justices on the *Roe* Court.²⁶¹ Today, most Republicans oppose abortion.²⁶² Nationwide, however, a significant majority of Americans favor abortion rights and have done so for many years.²⁶³

Yet another fault line in the culture wars is homosexual rights. Rightwing icon Justice Antonin Scalia railed against homosexual rights, including same sex marriage.²⁶⁴ He accused other justices of advancing the homosexual agenda.²⁶⁵ He claimed that his fellow justices were part of the coastal elite, not representative of the views of Americans generally.²⁶⁶ His position is echoed by the Republican Party. Its 2016- and 2020-party platforms opposed same sex marriage and efforts to provide workplace protection for LGBTQ Americans.²⁶⁷ Even before Pope Francis announced support for recognition of same sex unions, 70% of Americans said that they support same sex marriage.²⁶⁸

²⁶⁰ See GALLUP, *Abortion*, *supra* note 252.

²⁶¹ PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 441-49 (rev. ed. 2006). See also MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 133-62 (2016).

²⁶² See *Abortion Trends by Party Identification*, *supra* note 258.

²⁶³ GALLUP, *Abortion*, *supra* note 252 (public polling on legality of abortion access, 1976-2020). See also *Public Opinion on Abortion*, PEW RES. CENTER (Aug. 29, 2019), <https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/> (“As of 2019, public support for legal abortion remains as high as it has been in two decades of polling.”).

²⁶⁴ *Obergefell v. Hodges*, 576 U.S. 644, 713-720 (2014) (Scalia, J., dissenting); *United States v. Windsor*, 570 U.S. 744, 791-794 (Scalia, J., dissenting). See also *Lawrence v. Texas*, 539 U.S. 558, 586-605 (2003) (Scalia, J., dissenting) (defending criminal bans on sodomy); *Romer v. Evans*, 517 U.S. 620, 636-653 (1996) (Scalia, J., dissenting) (defending a Colorado law that stripped homosexual people of anti-discrimination protection).

²⁶⁵ *Lawrence v. Texas*, 539 U.S. at 602 (Scalia, J., dissenting).

²⁶⁶ *Id.* at 602-03.

²⁶⁷ Republican Party Platform Committee, *Republican Party Platform* 11-12 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf (“Traditional marriage and family, based on marriage between one man and one woman, is the foundation for a free society and has for millennia been entrusted with rearing children and instilling cultural values.”).

²⁶⁸ Andrew Scottle, *70% of Americans Support Same-Sex Marriage — A New High — A New Survey Finds*, CNN (Oct. 22, 2020), <https://www.cnn.com/2020/10/22/us/same-sex-marriage-support-increases-trnd/index.html>. While most Republicans do not support same sex marriage, between 40 and 49% do support it. See *Abortion Trends by Party Identification*, *supra* note 258.

Perhaps, Republicans garner public support for other notable policy initiatives. But that is simply not the case. Above, I discussed the transformation of the Republican Party on environmental issues.²⁶⁹ Many traditional Republicans led the way in the 1960s and 1970s on environmental issues, culminating in the Environmental Protection Act and the creation of the Environmental Protection Agency.²⁷⁰

Several writers have traced the Republican Party's abandonment of environmental protection as a policy priority.²⁷¹ Worse, they have identified how the extreme rightwing economic libertarian individuals and organizations have transformed the Republican Party's commitment to the environment and to a war on the EPA.²⁷² That war has included a broader war on science.²⁷³

Here, like abortion, many Republicans now support the national platform position on climate change.²⁷⁴ Happily for the planet, many younger Republicans differ from their elders.²⁷⁵

²⁶⁹ See Part I *supra*.

²⁷⁰ Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, ATLANTIC (Mar. 29, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/>.

²⁷¹ E.g. JAMES MORTON TURNER & ANDREW C. ISENBERG, *THE REPUBLICAN REVERSAL: CONSERVATIVES AND THE ENVIRONMENT FROM NIXON TO TRUMP* (Harvard U. Press 2018) (detailing the Republican Party's transformation since the late 1970s from one of environmental leaders into one that denounces climate change as a "hoax").

²⁷² See Jonathan H. Adler, *The Conservative Record on Environmental Policy*, 39 NEW ATLANTIS 133, 133-143 (2013); John Nichols, *The Once Common Republican Environmentalist Is Virtually Extinct*, THE NATION (Aug. 13, 2019), <https://www.thenation.com/article/archive/republican-environmentalist-virtually-extinct/>; Christopher Sellers, *How How Republicans Came to Embrace Anti-environmentalism*, VOX (June 7, 2017), <https://www.vox.com/2017/4/22/15377964/republicans-environmentalism>.

²⁷³ See CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* (2005). See also Steve Benen, *The Republican War on Science Intensifies in the Trump Era*, MSNBC (Mar. 30, 2017), <https://www.msnbc.com/rachel-maddow-show/the-republican-war-science-intensifies-the-trump-era-msna977021>. The Republican Party's disastrous response to the global COVID-19 pandemic is symptomatic of this larger disdain for science. See Jonathan Chait, *Why Has the Republican Response to the Pandemic Been so Mind-bogglingly Disastrous?*, N.Y. MAGAZINE (July 20, 2020), <https://nymag.com/intelligencer/2020/07/republican-response-coronavirus.html>; Ed Pilkington, *Pandemic Brings Trump's War on Science to the Boil – But Who Will Win?*, THE GUARDIAN (May 3, 2020), <https://www.theguardian.com/us-news/2020/may/03/science-donald-trump-coronavirus>.

²⁷⁴ Republican Party Platform, *supra* note 267, at 17-22.

²⁷⁵ Jeff Brady, *'Light Years Ahead' Of Their Elders, Young Republicans Push GOP On Climate Change*, NAT'L PUB. RADIO (Sept. 25, 2020), <https://www.npr.org/2020/09/25/916238283/light-years-ahead-of-their-elders-young-republicans-push-gop-on-climate-change>.

The overwhelming percentage of Democrats want greater federal action against climate change, one should not be surprised that their position is consistent with most Americans.²⁷⁶ Ninety percent of Democrats, about two-thirds of Americans generally, and only thirty-nine percent of Republicans believe that the federal government is not doing enough to protect the environmental and climate.²⁷⁷ Once again, the Democratic position on a major policy question has significant majority support.²⁷⁸ President Trump is not alone in defying those views. Erosion of environmental protection has been part of the Republican agenda dating back to Ron Reagan's presidency and continued through George W. Bush's presidency.²⁷⁹

Perhaps, Trump's signature "accomplishment" was the 2017 change to the tax laws.²⁸⁰ Like George W. Bush, Trump slashed tax rates.²⁸¹ Whatever else establishment Republicans say about their disapproval of Trump, they and he were on the same page when it came to cutting taxes.²⁸² Indeed, for years, Republican politicians have claimed that tax cuts were the solution for virtually any problem that the United States faced.²⁸³ As Stuart Stevens, a former Republican

²⁷⁶ Cary Funk & Meg Hefferon, *U.S. Public Views on Climate and Energy*, PEW RES. CENTER (Nov. 25, 2019), <https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy/>.

²⁷⁷ *Id.*

²⁷⁸ *Environment*, GALLUP, <https://news.gallup.com/poll/1615/environment.aspx> (last visited Feb. 7, 2021) (In 2019, 65% of Americans agreed with the statement: "Protection of the environment should be given priority, even at the risk of curbing economic growth.").

²⁷⁹ See Meyer, *How the U.S. Protects the Environment*, *supra* note 270.

²⁸⁰ Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (2017).

²⁸¹ Peter Frintzilas, *Economic Effects of the Tax Cuts and Jobs Act*, Blog, FORDHAM J. CORP. & FIN. L. (Dec. 19, 2019), <https://news.law.fordham.edu/jcfl/2019/12/19/economic-effects-of-the-tax-cuts-and-jobs-act/> (TCJA cut federal corporate income tax rate from 35 percent to 21 percent). See also Ivalina Kalcheva *et al.*, *(Un)intended Consequences? The Impact of the 2017 Tax Cuts and Jobs Act on Shareholder Wealth*, 118 J. BANKING & FIN. 105860 (2020) ("Counter to claims that the TCJA would quickly spur economic growth, we find that financially constrained and high growth opportunity firms did not benefit. Rather, market participants anticipate that most of the TCJA's benefits will be passed on to shareholders via higher corporate payouts.").

²⁸² Thomas Kaplan & Alan Rappeport, *Republican Tax Bill Passes Senate in 51-48 Vote*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/us/politics/tax-bill-vote-congress.html>.

²⁸³ See Republican Party Platform, *supra* note 267, at 1-2, 23. See also Matt O'Brien, *The GOP's Seven-letter Solution for Every Problem: Tax Cuts*, WASH. POST (Apr. 27, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/04/27/for-every-problem-republicans-have-a-solution-tax-cuts/>.

campaign strategist, observed in his book *It Was All a Lie*, Republican politicians may disagree with cutting taxes and the resulting buildup of the deficit, but they have taken “the pledge,” insisted upon by Grover Norquist, long time head of Americans for Tax Reform.²⁸⁴ Extreme rightwing libertarians, including Charles Koch and many others on the far right, support massive tax cuts and the shrinking of the federal government.²⁸⁵

Do Americans agree with the Republican position on tax cuts? The answer is unequivocally that they do not. The 2017 tax law garnered somewhere between 25 and 36% support, depending on the poll.²⁸⁶ Not surprisingly, most Republicans supported the law; most Democrats did not.²⁸⁷ But as with other Republican positions, most Americans did not support the Republican initiative,²⁸⁸ yet again demonstrating that Democrats share the views of most Americans on key policy questions.

Republican tax policy has gone hand in hand with the dramatic increase in income inequality in the United States.²⁸⁹ The change dates to the Reagan era and has continued and worsened under both Bush and Trump administrations.²⁹⁰ Few Americans support such income

²⁸⁴ STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* 147 (2020).

²⁸⁵ See generally JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE JUDICIAL RIGHT* (rev. ed. 2016). See also ROBERT CHERNOMAS & IAN HUDSON, *THE PROFIT DOCTRINE: ECONOMISTS OF THE NEOLIBERAL ERA* 27-34 (2017) (right-wing think tanks and other libertarian business-group organizations influencing government policy for decades).

²⁸⁶ Harry Enten, *The GOP Tax Cuts Are Even More Unpopular Than Past Tax Hikes*, FIVETHIRTYEIGHT (Nov. 29, 2017), <https://fivethirtyeight.com/features/the-gop-tax-cuts-are-even-more-unpopular-than-past-tax-hikes/>.

²⁸⁷ *Public Has Mixed Expectations for New Tax Law*, PEW RES. CENTER (Jan. 24, 2018), <https://www.pewresearch.org/politics/2018/01/24/public-has-mixed-expectations-for-new-tax-law/> (71% of Republican/Republican-leaning Americans said the TCJA would have a “mostly positive” effect on the country; 11% of Democrat/Democrat-leaning Americans said the same).

²⁸⁸ *Id.* (overall, only 37% of Americans approved of the TCJA).

²⁸⁹ THOMAS PINKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 237-270 (2014); MAYER, *supra* note 245, at 14-16. See generally EMMANUEL SAEZ & GABRIEL ZUCMAN, *THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY* (2019).

²⁹⁰ PINKETTY, *supra* note 289, at 508-12. See also Jeffrey Frakel, *How the GOP Tax Overhaul Compares to the Reagan-era Tax Bills*, PBS NEWS HOUR (Dec. 4, 2017), <https://www.pbs.org/newshour/economy/making-sense/how-the-gop-tax-overhaul-compares-to-the-reagan-era-tax-bills>.

inequality.²⁹¹ Despite the Republican Party's role in creating that inequality, even most Republicans support federal efforts to reduce the inequality.²⁹²

Gun rights is yet another instance in which Democratic policy proposals are much closer to majoritarian sentiment than those of the Republican Party. Democrats often propose modest regulation of weapons, including automatic weapons.²⁹³ Even when the nation is not in mourning over a mass shooting like Sandy Hook Elementary School,²⁹⁴ overwhelming percentages of Americans favor Democratic politicians' proposals.²⁹⁵ Few Republican politicians join them.²⁹⁶ Instead, they have taken the extremist view of the National Rifle Association, which has become a piggy bank for many Republicans.²⁹⁷

²⁹¹ Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call It a Top Priority*, PEW RES. CENTER (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/most-americans-say-there-is-too-much-economic-inequality-in-the-u-s-but-fewer-than-half-call-it-a-top-priority/>.

²⁹² *Id.* at Section 4, *Views on Reducing Economic Inequality*, <https://www.pewsocialtrends.org/2020/01/09/views-on-reducing-economic-inequality/>.

²⁹³ See, e.g., *Preventing Gun Violence*, DEMOCRATIC PARTY, <https://democrats.org/where-we-stand/the-issues/preventing-gun-violence/> (last visited Feb. 10, 2021); David Morgan, *Democrats Pressure Republicans by Advancing Gun Control Bills*, REUTERS (Sept. 10, 2019), <https://www.reuters.com/article/us-usa-guns-congress/democrats-pressure-republicans-by-advancing-gun-control-bills-idUSKCN1VV2AT>.

²⁹⁴ James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), <https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>; Steve Vogel, Sari Horowitz & David A. Farenthold, *Sandy Hook Elementary Shooting Leaves 28 Dead, Law Enforcement Sources Say*, WASH. POST (Dec. 14, 2012), https://www.washingtonpost.com/politics/sandy-hook-elementary-school-shooting-leaves-students-staff-dead/2012/12/14/24334570-461e-11e2-8e70-e1993528222d_story.html.

²⁹⁵ Laura Santhanam, *Most Americans Support These 4 Types of Gun Legislation, Poll Says*, PBS (Sept. 10, 2019), <https://www.pbs.org/newshour/politics/most-americans-support-stricter-gun-laws-new-poll-says>. See also *Guns*, GALLUP, <https://news.gallup.com/poll/1645/guns.aspx> (In 2020, 57% of Americans favor stricter laws covering the sale of firearms) (last visited Feb. 14, 2021).

²⁹⁶ Perry Bacon Jr., *GOP Politicians Are Much More Resistant To Gun Control Than GOP Voters Are*, FIVETHIRTYEIGHT (Aug. 6, 2019), <https://fivethirtyeight.com/features/gop-politicians-are-much-more-resistant-to-gun-control-than-gop-voters/>.

²⁹⁷ See Luke Johnson, *NRA's 2016 Donation to Trump's Campaign Pays Off*, FORTUNE (Aug. 21, 2019), <https://fortune.com/2019/08/21/how-much-did-nra-contribute-trump-campaign/> (NRA contributed over \$30 million to Republican nominee for President). See also Harry Enten, Analysis, *The NRA Used to Be Much More Bipartisan. Now It's Mostly Just a Wing of the GOP*, CNN (Feb. 24, 2018), <https://www.cnn.com/2018/02/24/politics/nra-partisan-bipartisan-republican/index.html> (NRA contributed to 98.4% of all Republican candidates for the U.S. House).

Writing for the New York Times, Sahil Chinoy provides another perspective on the political divide within the United States.²⁹⁸ Tracking positions taken by both parties, Chinoy found that the Republican Party now leans much farther to the right than most traditional conservative parties in Western Europe and Canada.²⁹⁹ According to data accumulated by the Manifesto Project, the Republican Party has allowed its extreme rightwing elements dominate its party positions.³⁰⁰ That is simply not the case with Democrats. Instead, Democrats have moved to the right on many issues.³⁰¹

One needs only to think back to Bill Clinton’s presidency. He coopted many Republican positions, like “ending welfare as we know it.”³⁰² The trend continued during President Obama’s two terms in office, as summarized by one author, in the fruitless search for compromise with Republicans.³⁰³ Obama’s market-driven healthcare reform was modeled on former Massachusetts Governor Mitt Romney’s Massachusetts plan.³⁰⁴ Obama’s efforts yielded virtually

²⁹⁸ Chinoy, *supra* note 8.

²⁹⁹ *Id.*

³⁰⁰ *Manifesto Project Main Dataset (Party Preferences)*, MANIFESTO PROJECT (2020), <https://manifesto-project.wzb.eu/datasets>.

³⁰¹ See Kevin Drum, Commentary, *Democrats Have Moved to the Right, Not the Left*, MOTHER JONES (May 2, 2012), <https://www.motherjones.com/kevin-drum/2012/05/democrats-have-moved-right-not-left/>.

³⁰² Alana Semuels, *The End of Welfare as We Know It*, THE ATLANTIC (April 1, 2016), <https://www.theatlantic.com/business/archive/2016/04/the-end-of-welfare-as-we-know-it/476322/>. See also Martin Carcasson, *Ending Welfare as We Know It: President Clinton and the Rhetorical Transformation of the Anti-Welfare Culture*, 9(4) RHETORIC & PUB. AFFAIRS 655, 655-692 (2006).

³⁰³ Drum, *supra* note 301. See also Michael Grunwald, *The Victory of ‘No’: The GOP’s Unprecedented Anti-Obama Obstructionism Was a Remarkable Success. And Then It Handed the Party to Donald Trump*, POLITICO (Dec. 4, 2016), <https://www.politico.com/magazine/story/2016/12/republican-party-obstructionism-victory-trump-214498/>.

³⁰⁴ See Jessica Taylor, *Mitt Romney Finally Takes Credit For Obamacare*, NAT’L PUB. RADIO (Oct. 23, 2015), <https://www.npr.org/sections/itsallpolitics/2015/10/23/451200436/mitt-romney-finally-takes-credit-for-obamacare>. See also Liz Halloran, *A Tale Of Two Health Plans: Romney Versus Obama*, NAT’L PUB. RADIO (Oct. 17, 2011), <https://www.npr.org/2011/10/14/141357505/a-tale-of-two-health-plans-romney-versus-obama>.

no Republican support.³⁰⁵ Today, some Republicans claim that the Affordable Care Act is a form of Leninist socialism.³⁰⁶

Leninist or not, most Americans now support the Democratic position on healthcare reform.³⁰⁷ That does not mean support for a single-payer system.³⁰⁸ But it does mean support for building on the Affordable Care Act and expanding its coverage.³⁰⁹ Despite years of threatening to overturn the ACA, the Republicans have come up with no alternative.³¹⁰ Trump promised a great plan, keeping in place protection for pre-existing coverage, but never came forward with a legislative initiative.³¹¹

³⁰⁵ *Roll Call Vote 111th Congress - 1st Session*, United States Senate, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm?congress=111&session=1&vote=00396 (no Republican Senators voted in favor of the bill). See also *Obamacare Overview*, BALLOTPEDIA, https://ballotpedia.org/Obamacare_overview (last visited Feb. 14, 2021); Bill Schneider, *Opposing Obamacare: GOP's Defining Issue*, REUTERS (Oct. 28, 2013), <http://blogs.reuters.com/great-debate/2013/10/28/opposing-obamacare-gops-defining-issue/>.

³⁰⁶ E.g., *Governor Bryant Calls Obamacare a "Socialist Takeover"*, WLBT (June 25, 2015), <https://www.wlbt.com/story/29408082/governor-calls-obamacare-a-socialist-takeover/> (Mississippi Governor Phil Bryant calling the health care law "a socialist takeover of health care forced down the throats of the American people without proper review..."); David Zurawik, *Ben Carson Breaks New Ground Quoting Lenin to Explain Obamacare*, Baltimore Sun (Oct. 9, 2013), <https://www.baltimoresun.com/opinion/columnists/zurawik/bal-ben-carson-lenin-fox-news-20131009-story.html> (Republican Ben Carson quoted as saying, when discussing the ACA: "What's really interesting, Vladimir Lenin, one of the founders of socialism and communism, he said, 'Socialized medicine is the keystone of the archway to the socialist state'").

³⁰⁷ Frank Newport, *Americans' Mixed Views of Healthcare and Healthcare Reform*, GALLUP (May 21, 2019), <https://news.gallup.com/opinion/polling-matters/257711/americans-mixed-views-healthcare-healthcare-reform.aspx>.

³⁰⁸ But see Bradley Jones, *Increasing Share of Americans Favor a Single Government Program to Provide Health Care Coverage*, PEW RES. CENTER (Sept. 29, 2020), <https://www.pewresearch.org/fact-tank/2020/09/29/increasing-share-of-americans-favor-a-single-government-program-to-provide-health-care-coverage/>;

³⁰⁹ *Public Opinion on Single-Payer, National Health Plans, and Expanding Access to Medicare Coverage*, KAISER FAMILY FOUND. (Oct 16, 2020), <https://www.kff.org/slideshow/public-opinion-on-single-payer-national-health-plans-and-expanding-access-to-medicare-coverage/>.

³¹⁰ See Jonathan Cohn, *Blog, The ACA, Repeal, And The Politics Of Backlash*, HEALTH AFFAIRS (Mar. 6, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200305.771008/full/>. At time of writing, the Republican Party has not put forward any successful alternative to the ACA.

³¹¹ Joshua Cohen, *Trump Reneges On Promise To Produce 'Phenomenal' Replacement For Obamacare [Update]*, FORBES (Sept. 3, 2020), <https://www.forbes.com/sites/joshuacohen/2020/09/03/trump-reneges-on-promise-to-produce-phenomenal-replacement-for-obamacare/?sh=1aca92ff7cd1>. See also Chris Donovan & Adam Kelsey, *Fact-checking Trump's 'Repeal and Replace' Obamacare Timeline*, ABC NEWS (Mar. 24, 2017), <https://abcnews.go.com/Politics/fact-checking-trumps-repeal-replace-obamacare-timeline/story?id=46360908>.

The Republicans' move the right may have accelerated in 2010 when, financed in part by the Koch brothers, the Tea Party sprung up to challenge moderate Republicans.³¹² However, as political scientists Jacob Hacker and Paul Pierson demonstrated in their 2005 book *Off Center*, Republicans including George W. Bush were moving the Republican Party far to the right and far away from the center of American opinion, unlike Democrats, who stayed close to the center.³¹³

Despite his narrow Electoral College victory and loss of the popular vote, Bush made no effort to govern at the center.³¹⁴ Instead, his administration attempted to push policies that were far to the right of popular sentiment.³¹⁵ Some of those policies were rejected out of hand, like efforts to privatize Social Security.³¹⁶

Like Trump, Bush claimed success in getting tax cuts passed.³¹⁷ The primary beneficiaries were the wealthiest Americans.³¹⁸ As Bush once said at a fundraising event, “What an impressive crowd: the haves, and have-mores. Some people call you the elite, I call you my base.”³¹⁹ Not surprisingly, most Americans did not favor many aspects of his tax cuts, especially

³¹² MAYER, *supra* note 245, at 220-27.

³¹³ See generally JACOB HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* (Yale Univ. P, 2006).

³¹⁴ See *Bush and Public Opinion*, PEW RES. CENTER (Sec. 18, 2008), <https://www.pewresearch.org/politics/2008/12/18/bush-and-public-opinion/> (Bush exited office with 24% approval). See also Sean Wilentz, *How Bush Destroyed the Republican Party*, ROLLING STONE (Sept. 4, 2008), <https://www.rollingstone.com/culture/culture-news/how-bush-destroyed-the-republican-party-162234/>

³¹⁵ See *Bush and Public Opinion*, *supra* note 314; Jacob S. Hacker & Paul Pierson, *Abandoning the Middle: The Bush Tax Cuts and the Limits of Democratic Control*, 3(1) PERSPECTIVES ON POLITICS 31, 31-55 (2005).

³¹⁶ See William A. Galston, *Why the 2005 Social Security Initiative Failed, and What It Means for the Future*, BROOKINGS INST. (Sept. 21, 2007), <https://www.brookings.edu/research/why-the-2005-social-security-initiative-failed-and-what-it-means-for-the-future/>.

³¹⁷ Andrew Glass, *President Bush Signs Tax Cut Into Law, June 7, 2001*, POLITICO (June 7, 2016), <https://www.politico.com/story/2016/06/president-bush-signs-tax-cut-into-law-june-7-2001-223868>.

³¹⁸ Emily Horton, *The Legacy of the 2001 and 2003 “Bush” Tax Cuts*, CTR. BUDGET & POL’Y PRIORITIES (Oct. 23, 2017), <https://www.cbpp.org/research/federal-tax/the-legacy-of-the-2001-and-2003-bush-tax-cuts>.

³¹⁹ Clip of Al Smith Memorial Dinner, C-SPAN (Oct. 19, 2000), <https://www.c-span.org/video/?c4506459/user-clip-haves-mores>.

when pollsters asked questions about priorities, not just about whether tax cuts were good as a general matter.³²⁰ They certainly did not favor the top-heavy nature of those cuts.³²¹ Polls suggested limited support for the Bush tax cuts, even with misrepresentations made by Republicans about the nature of the cuts and long term effects of those cuts.³²²

These are hardly the only examples where Democratic policy positions are closer to the mainstream of America than are Republican policy positions.³²³ But these examples should suffice to demonstrate the falsehood of the claim made by many Republicans that the Democrats have moved to the left.³²⁴ The willingness of centrists to ignore the trope is dangerous to American democracy because the Republican Party has moved so far to the right of center.³²⁵ As political scientists Hacker and Pierson demonstrated in *Let Them Eat Tweets: How the Right Rules in An Age of Extreme Inequality*, the Republican Party is dominated by extreme rightwing plutocrats.³²⁶ The willingness of centrists to sit on the sidelines or to vote with Republicans as if the policy choices were a coin toss puts our democracy at risk.

Part III: Abandoning Principles and Norms: A Pure Power Grab

³²⁰ HACKER & PIERSON, *supra* note 10, at 49-50.

³²¹ HACKER & PIERSON, *supra* note 10, at 51.

³²² *Id.*

³²³ See, e.g., *Polling the Left Agenda*, DATA FOR PROGRESS, <https://www.dataforprogress.org/polling-the-left-agenda/> (last visited Feb. 13, 2021) (creating generic versions of prescription drugs, public option for internet provider, job guarantee, ending cash bail, universal basic income).

³²⁴ E.g., William A. Galston, Opinion, *Democrats Move Left, but the Center Holds*, WALL STREET J. (Aug. 14, 2020), <https://www.wsj.com/articles/democrats-move-left-but-the-center-holds-11597429469>.

³²⁵ See Mayank Aggarwal, *Republican Party is Now More Illiberal and Resembles Authoritarian Parties in India, Hungary and Turkey*, *Study Says*, INDEPENDENT (Oct. 26, 2020), <https://www.independent.co.uk/news/world/americas/us-election-2020/gop-trump-republican-democrats-authoritarian-hungary-austria-india-poland-turkey-b1343847.html>; Frank James, *Political Scientist: Republicans Most Conservative They've Been In 100 Years*, NAT'L PUB. RADIO (Apr. 13, 2012), <https://www.npr.org/sections/itsallpolitics/2012/04/10/150349438/gops-rightward-shift-higher-polarization-fills-political-scientist-with-dread>.

³²⁶ See generally JACOB S. HACKER & PAUL PIERSON, *LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY* (2020).

As developed above, the Republican Party's move to the far right precedes Trump's election.³²⁷ That recognition is important to understand how the rightwing will be able to hold onto power greater than one would expect, given that it is the distinct minority party.³²⁸ Congressional Republicans' willingness to abandon political norms has been part of that process.³²⁹ This section explores how that process has allowed Trump to appoint far right-wing judges and justices, a result that is likely to continue erosion of democracy well into the future.³³⁰ Specifically, this section explores the filibuster and a process called the blue slip. Both could have had moderating influences on selection of judges; once abandoned by the Senate, Trump has filled the federal court system with extremists.³³¹

The filibuster has a long history, often frustrating the will of the majority.³³² For example, for many years, Dixiecrats were able to prevent civil rights legislation from getting to a floor vote in the Senate.³³³ Often missed, however, is how the filibuster can prevent anti-democratic conduct in the federal government. This section explores how the Republican move to the far right and the abandonment of the filibuster have allowed President Trump and Mitch McConnell

³²⁷ See Part II *supra*.

³²⁸ *Party Affiliation*, GALLUP, <https://news.gallup.com/poll/15370/party-affiliation.aspx> (last visited Feb. 28, 2021).

³²⁹ See Part II *supra*.

³³⁰ *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited Feb. 28, 2021).

³³¹ Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html?action=click&module=Top%20Stories&pgtype=Homepage>. That includes Amy Coney Barrett as well. See Kim Phillips-Fein, *Opinion, Is Amy Coney Barrett Joining a Supreme Court Built for the Wealthy?*, N.Y. TIMES (Sept. 27, 2020), <https://www.nytimes.com/2020/09/27/opinion/amy-coney-barrett-business-supreme-court.html?action=click&module=Opinion&pgtype=Homepage>; Victoria Bekiempis, *Meet Some of Trump's Most Conservative Judicial Picks*, GUARDIAN (Apr. 30, 2020), <https://www.theguardian.com/us-news/2020/apr/30/meet-trump-most-conservative-judicial-pick>

³³² Sarah A. Binder, *The History of the Filibuster*, BROOKINGS INST. (Apr. 22, 2010), <https://www.brookings.edu/testimonies/the-history-of-the-filibuster/>.

³³³ *The Filibuster That Almost Killed the Civil Rights Act*, CONSTITUTION CENTER (Apr. 11, 2014), <https://constitutioncenter.org/blog/the-filibuster-that-almost-killed-the-civil-rights-act/>.

to push the judiciary far to the right of most Americans. Further, this push will continue to threaten American democracy well into the future.³³⁴

In exploring the move to the far right, this section also considers the abandonment of another norm, the use of the “blue slip,” as a way to force a president to moderate his judicial appointments to the center, rather than to the extreme wing of his party.³³⁵

Not long after President Obama’s election, Mitch McConnell signaled his desire to make Obama a one-term president and to frustrate many of his initiatives.³³⁶ As part of a long-standing strategy of the right, led by the Federalist Society,³³⁷ McConnell used his power to prevent Obama from filling many judicial vacancies, even before his exercise of raw power that prevented Merrick Garland from appointment to the Supreme Court.³³⁸ So effective was McConnell’s strategy—when Republicans controlled the Senate and even when the Democrats did—Obama was not able to fill over 100 federal judgeships, including the Supreme Court vacancy.³³⁹

³³⁴ See Mark Sherman, Kevin Freking & Matthew Daly, *Trump’s Court Appointments Will Leave Decades-long Imprint*, ASSOC. PRESS (Dec. 26, 2020), <https://apnews.com/article/joe-biden-donald-trump-judiciary-coronavirus-pandemic-us-supreme-court-c37607c9987888058d3d0650eea125cd>; Ruiz et al., *Conservative Agenda*, *supra* note 331.

³³⁵ See Mitchel A. Sollenberger, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, CONG. RES. SERVICE (Oct. 22, 2003), <http://congressionalresearch.com/RL32013/document.php>.

³³⁶ Frank James, *Sen. Mitch McConnell Insists: One and Done for Obama*, NAT’L PUB. RADIO (Nov. 4, 2010), <https://www.npr.org/sections/itsallpolitics/2010/11/04/131069048/sen-mcconnell-insists-one-term-for-obama>.

³³⁷ See generally, MICHAEL AVERY & DANIELLE MCLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013).

³³⁸ Seung Kim, *McConnell’s Historic Judge Blockade*, POLITICO (July 14, 2016), <https://www.politico.com/story/2016/07/mitch-mcconnell-judges-225455>.

³³⁹ David G. Savage, *This Congress Filled the Fewest Judgeships Since 1952, That Leaves a Big Opening for Trump*, L.A. TIMES (Dec. 31, 2016), <https://www.latimes.com/politics/la-na-judges-trump-senate-20161231-story.html>.

During Democratic control of the Senate, Republicans used the filibuster to prevent judges from moving to a floor vote.³⁴⁰ Democrats took a risk to end the Republican blockade.³⁴¹ Then-Majority Leader Harry Reid led efforts to eliminate the filibuster for judicial nominees for district and appellate courts.³⁴² By a simple majority vote, the Senate agreed to abandon the filibuster for lower courts, but not for the Supreme Court.³⁴³

Abandoning the filibuster for lower courts allowed Senate Democrats to secure approval of some of Obama's nominees.³⁴⁴ But the filibuster was not the Republicans' only stalling device. The other device used by McConnell and his right-wing allies in the Senate was the blue slip.³⁴⁵ The Senate has used the process for about a century, even though it is not written in the Rules of the Senate.³⁴⁶ The process was simple:

After a president nominates an individual for a U.S. circuit or district court judgeship, the chair of the Senate Judiciary Committee sends a blue-colored form to the senators representing the home state of the nominee. If a home state senator has no objection to a nominee, the blue slip is returned to the chair with a positive response. If, however, a

³⁴⁰ Tom McCarthy, *Senate Approves Change to Filibuster Rule After Repeated Republican Blocks*, Guardian (Nov. 21, 2013), <https://www.theguardian.com/world/2013/nov/21/harry-reid-senate-rules-republican-filibusters-nominations>.

³⁴¹ *Id.*

³⁴² Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

³⁴³ *Id.*

³⁴⁴ Al Kamen & Paul Kane, *Did 'Nuclear Option' Boost Obama's Judicial Appointments?*, WASH. POST (Dec. 17, 2014), <https://www.washingtonpost.com/blogs/in-the-loop/wp/2014/12/17/did-nuclear-option-boost-obamas-judicial-appointments/>.

³⁴⁵ Russell Wheeler, *Senate GOP Used 'Blue Slips' to Block Obama Judicial Nominees, But Now Wants to Trash the Practice*, BROOKINGS INST. (May 25, 2017), <https://www.brookings.edu/blog/fixgov/2017/05/25/blue-slips-and-judicial-nominees-in-senate/>.

³⁴⁶ See Sollenberger, *supra* note 335.

home-state senator objects to a nominee, the blue slip is either withheld or returned with a negative response.³⁴⁷

Even though the rule is not in the Senate rules, during Obama's term, the Senate continued to observe the tradition.³⁴⁸

Under McConnell's leadership, the Senate blocked Obama's nominees even though his nominees were highly regarded and, in most instances, were not considered outside the mainstream of American politics.³⁴⁹ Despite attempts to portray Obama as a leftist, by temperament and by policy positions, Obama was a centrist.³⁵⁰ His unsuccessful attempt to appoint highly respected moderate Judge Merrick Garland speaks volumes on that point.³⁵¹ Even had Obama not been a centrist, the tradition of blue slips tended to moderate a president's judicial choices to the center if his appointments were in states or circuits where senators were from the opposing party.³⁵²

Life has changed during the Trump administration. As cited above, McConnell's dilatory strategies created the opportunity for Trump to fill 100 vacancies in the lower federal courts.³⁵³

³⁴⁷ *Judicial Vacancies*, AM. BAR ASS'N (Feb. 26, 2021), https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_vacancies/.

³⁴⁸ Wheeler, *supra* note 345.

³⁴⁹ See Burgess Everett & Seung Min Kim, *Judge Not: GOP Blocks Dozens of Obama Court Picks*, POLITICO (July 6, 2015), <https://www.politico.com/story/2015/07/payback-gop-blocks-obama-judge-picks-judiciary-119743>.

³⁵⁰ See Ryan Cooper, *The Obama Legacy is Not What Liberals Think*, THE WEEK (Dec. 31, 2019), <https://theweek.com/articles/886685/obama-legacy-not-what-many-liberals-think>; Steve Chapman, *Opinion, I told you Obama Was a Moderate*, CHICAGO TRIB. (Nov. 8, 2019), <https://www.chicagotribune.com/columns/steve-chapman/ct-column-obama-warren-woke-progressives-chapman-20191108-ccr4jkd3hfe67oonvg6qnav4xe-story.html>; Kimberly Amadeo, *Compare Obama vs. Bush on Economic Policies and the Debt*, THE BALANCE (Aug. 7, 2019), <https://www.thebalance.com/how-do-obama-and-bush-compare-on-their-economic-policies-3305622>; John P. Avalon, *Obama's Steady Centrist*, POLITICO (Jul 19, 2008), <https://www.politico.com/story/2008/07/obamas-steady-centrist-011880>.

³⁵¹ See Ron Elving, *What Happened With Merrick Garland In 2016 And Why It Matters Now*, NAT'L PUB. RADIO (June 29, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

³⁵² See Sollenberger, *supra* note 335.

³⁵³ Savage, *Fewest Judgeships Since 1952*, *supra* note 339.

Even before the Republican-led Senate invoked the “nuclear option”³⁵⁴ to guarantee Neil Gorsuch’s appointment, Republicans were moving lower court nominees through the process with little observance to traditional restraints.³⁵⁵

As discussed above, Trump and his Republican Party have abandoned norms at a prodigious rate.³⁵⁶ Since the beginning of Trump’s Presidency, two Senators have chaired the Senate Judiciary Committee.³⁵⁷ Senator Grassley, the first Chairman of the Judiciary Committee under the Trump Administration, allowed several circuit court nominees to have hearings without the support of their home-state senators.³⁵⁸ Senator Graham followed Senator Grassley as Chair of the Judicial Committee and ignored the blue slip process.³⁵⁹ Chairman Graham held hearings for circuit court nominees who received opposition from their home-state senators.³⁶⁰

The threat of a filibuster could push the nominating president to appoint more centrist judges.³⁶¹ With that gone, the blue slip process might have worked the same way when a

³⁵⁴ See Alex Seitz-Wald, *The Nuclear Option: What It Is and Why It Matters*, NBC NEWS (Apr. 3, 2017), <https://www.nbcnews.com/politics/congress/nuclear-option-what-it-why-it-matters-n742076>.

³⁵⁵ See Dylan Matthews, *Senate Republicans Are Making It Easier To Push Through Trump's Judge Picks*, VOX (Nov. 16, 2017), <https://www.vox.com/policy-and-politics/2017/10/13/16462128/blue-slips-senate-republican-judge-nomination-appointment>.

³⁵⁶ See Amy Siskind, *This Is Not Normal*, WASH. POST (updated Oct. 16, 2020), <https://www.washingtonpost.com/graphics/2020/outlook/siskind-list-trump-norms/> (a running list of governmental norms that Trump and his administration have broken since the first week of his Presidency, because “[e]xperts in authoritarianism advise keeping a list of things changing, subtly, around you, so you’ll remember”).

³⁵⁷ *Previous Committee Chairmen*, SENATE COMM. JUDICIARY, <https://www.judiciary.senate.gov/about/chairman/previous> (last visited Feb. 28, 2021).

³⁵⁸ Joseph P. Williams, *Sen. Grassley Opts to Ignore Blue Slips Against Trump Judicial Nominees*, U.S. NEWS & WORLD REPORT (Nov. 16, 2017), <https://www.usnews.com/news/politics/articles/2017-11-16/sen-grassley-opts-to-ignore-blue-slips-against-trump-judicial-nominees>.

³⁵⁹ Stephan Dinan, *Lindsey Graham: Blue Slips Won’t Derail Trump Appeals Court Picks*, ASSOC. PRESS (Feb. 7, 2019), <https://apnews.com/article/f58b248ff545a09744ee29f1dc4fc3e7>.

³⁶⁰ Tim Ryan, *Senate Panel Advances Nominee for Third Circuit Bench*, COURTHOUSE NEWS SERVICE (June 5, 2019), <https://www.courthousenews.com/senate-panel-advances-nominee-for-third-circuit-bench/>; Tracie Mauriello, *Senate Confirms Peter Phipps of Pittsburgh to U.S. Court of Appeals*, PITTSBURGH POST-GAZETTE (July 16, 2019), <https://www.post-gazette.com/news/politics-state/2019/07/16/Peter-Phipps-Third-circuit-confirmation-blue-slip-trump-federal-court/stories/201907160118>.

³⁶¹ See Frederick A.O. Schwartz, Jr., *Opinion, Saving the Supreme Court*, BRENNAN CTR J. (Sept. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/saving-supreme-court> (“Filibusters (or the threat of

Democrat could hold up the judicial appointment. With both moderating devices gone and with the Republican Party moving far to the right, the result has been a sharp turn to the far of popular sentiment on core issues.³⁶²

McConnell, Trump, and leaders of the Federalist Society were proud of their accomplishment.³⁶³ The shape of the Trump judiciary is out of step with the rest of the nation.³⁶⁴ Most are white and “conservative,” according to a detailed report that appeared in the New York Times.³⁶⁵ In an interview with NPR, the executive vice president of policy at the Leadership Conference on Civil and Human Rights called President Trump’s judicial appointees the “least diverse class of judicial nominees that we have seen in modern history.”³⁶⁶ By her estimate, there had not been one African American or Latinx nominee in the first two and one-half years of Trump’s presidency.³⁶⁷ According to the authors of *A Conservative Agenda Unleashed on the Federal Courts*, two-thirds of Trump’s appointees did not receive 60 votes in the Senate, suggesting that they would not have survived a filibuster, but for the invocation of the “nuclear

filibusters), which required 60 votes to overcome, had perhaps been a force against overly partisan nominations, since to get to 60, a nominee usually had to win some votes of senators from the other party.”)

³⁶² See Andrew Cohen, *Trump and McConnell’s Overwhelmingly White Male Judicial Appointments*, BRENNAN CTR. J. (July 1, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/trump-and-mcconnells-overwhelmingly-white-male-judicial-appointments> (“The president and Senate majority leader have pushed through a slate of judges and Justice Department leaders shockingly at odds with American demographics.”).

³⁶³ Tessa Berenson, *'We'd Like to See America Right of Center.' Mitch McConnell Explains His Strategy on Judges*, TIME (Feb. 8, 2018), <https://time.com/5138247/mitch-mcconnell-judicial-strategy/>. See also David Montgomery, *Conquerors of the Courts*, Wash. Post Magazine (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/>

³⁶⁴ Ruiz et al., *A Conservative Agenda*, *supra* note 331; Cohen, *supra* note 362.

³⁶⁵ Ruiz et al., *A Conservative Agenda*, *supra* note 331.

³⁶⁶ Interview by Steve Inskeep with Kristine Lucius of The Leadership Conference on Civil and Human Rights, Morning Edition, NAT’L PUB. RADIO (Aug. 2, 2019), <https://www.npr.org/2019/08/02/747520685/trumps-judicial-legacy>.

³⁶⁷ *Id.*

option.”³⁶⁸ And, of course, Neil Gorsuch and Brett Kavanaugh would probably not be on the Court, but for the abandonment of the filibuster.³⁶⁹

National Public Radio legal reporter Carrie Johnson wrote an article on Trump’s appointees, trying to dissect their candidacies.³⁷⁰ She observed that many of his nominees refused to answer such basic questions like whether they support the Supreme Court’s landmark decision in *Brown v. Board of Education*.³⁷¹ She also noted their ties to the rightwing Federalist Society, now the surrogate for deciding who should be on the federal bench.³⁷² Another reporter estimated that all but eight of the Trump appellate judges had ties to the Federalist Society.³⁷³ Despite President George W. Bush’s reputation for rightwing appointments and association with the Federalist Society, Trump appointed about twice as many Federalist Society friendly judges than did Bush.³⁷⁴

Trump appointees advocated for many of the Republican causes, again as urged above,³⁷⁵ that lack support of most Americans:

His appointees include former litigators who argued against legalizing same-sex marriage; advocated blocking Medicaid reimbursements to health care providers performing abortions; argued that corporations with religious owners could not be

³⁶⁸ Ruiz et al., *A Conservative Agenda*, *supra* note 331.

³⁶⁹ *Id.*

³⁷⁰ Carrie Johnson, *Trump’s Judicial Legacy*, NAT’L PUB. RADIO (Aug. 2, 2019), <https://www.npr.org/2019/08/02/747520685/trumps-judicial-legacy>.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ Ruiz et al., *A Conservative Agenda*, *supra* note 331.

³⁷⁴ MA’s memo has this and add – The process of appointing more rightwing Federalist Society endorsed candidates has a long history among Republicans, including during Bush’s term. But Trump has accelerated the process, again, in large part through the abandonment of recognized moderating processes. *See* Part II, *supra*. *See also* Li Zhou, Study: Trump’s Judicial Appointees Are More Conservative Than Those of Past Republican Presidents, Vox (Jan. 25, 2019), <https://www.vox.com/2019/1/25/18188541/trump-judges-mconnell-senate>.

³⁷⁵ *See* Part II, *supra*.

required to pay for insurance coverage of certain forms of birth control; and supported the Trump's administration's choice to include a question about citizenship on the census.³⁷⁶

Additionally, at least eight judges actively opposed the legalization of gay marriage and argued for Trump administration-type immigration positions.³⁷⁷ Additionally, close to 20 appointees worked to limit access to abortion or contraception.³⁷⁸

Anyone doubting Trump's preference for judges outside the mainstream of American opinion needs only to look at Amy Coney Barrett and her appointment process.³⁷⁹ Despite unconvincing efforts to distinguish their rationalizations for refusing even to conduct hearings for Merrick Garland, McConnell and his fellow-travelers like Lindsay Graham shamelessly pushed her appointment through the Senate in fast order.³⁸⁰ Her views are hardly within the mainstream.³⁸¹ Her opposition to abortion rights was central to her appointment.³⁸² As troubling

³⁷⁶ Ruiz et al., *A Conservative Agenda*, *supra* note 331.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ See Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/article/amy-barrett-views-issues.html>; Vicky Baker, *Amy Coney Barrett: Who Is Trump's Supreme Court Pick?*, BBC NEWS (Oct. 27, 2020), <https://www.bbc.com/news/election-us-2020-54303848>; Amy Howe, *Profile of a Potential Nominee: Amy Coney Barrett*, SCOTUSBLOG (Sept. 21, 2020), <https://www.scotusblog.com/2020/09/profile-of-a-potential-nominee-amy-coney-barrett/>.

³⁸⁰ See Griffin Connolly, *Amy Coney Barrett Hearing: Lindsey Graham Defends Contentious Decision to Push Ahead With Nomination*, THE INDEPENDENT (Oct. 12, 2020), <https://www.independent.co.uk/news/world/americas/us-politics/amy-coney-barrett-hearing-scotus-lindsey-graham-senate-trump-b990459.html>.

³⁸¹ See Liptak, *Barrett's Record*, *supra* note 379.

³⁸² See David G. Savage, *Amy Coney Barrett Is the Favorite of Social Conservatives, But Democrats Are Already Taking Aim*, L.A. TIMES (July 9, 2018), <https://www.latimes.com/politics/la-na-pol-amy-barrett-supreme-court-20180709-story.html>; Sarah McCammon, *A Look At Amy Coney Barrett's Record On Abortion Rights*, NAT'L PUB. RADIO (Sept. 28, 2020), <https://www.npr.org/2020/09/28/917827735/a-look-at-amy-coney-barretts-record-on-abortion-rights>.

is her opposition to the Affordable Care Act.³⁸³ Some of her rulings suggest a strong pro-corporate and anti-worker, anti-union orientation.³⁸⁴

Trump made clear preference for young judges as well. In nominating Barrett, for example, he suggested that she might be on the Court for fifty years.³⁸⁵ Many of his nominees are young, creating the realistic chance that they will be on the bench well into the second half of this century.³⁸⁶

One should not doubt the hard turn to the right. Many of Trump's appointees replaced Democratic judges.³⁸⁷ But commentators have recognized that even when they have replaced Republican appointees, they are further to the right than the judges whom they replaced.³⁸⁸

As developed above, much of this change resulted from the abandonment of political norms and the right wings' unwillingness to moderate towards the political center.³⁸⁹ As developed below, the current structure of the federal judiciary creates a continuing risk to our

³⁸³ Ian Millhiser, *Amy Coney Barrett's Opposition to Obamacare, Explained*, VOX (Oct. 15, 2020), <https://www.vox.com/21514900/amy-coney-barrett-obamacare-supreme-court-california-texas-nfib-king-burwell-aca>.

³⁸⁴ *E.g.*, *Smith v. Illinois Dept. Trans.*, 936 F.3d 554, 561 (7th Cir. 2019) (despite being subjected to repeated verbal abuse, including having been called the N-word by his supervisor, Judge Barrett wrote plaintiff had "introduced no evidence that [supervisor's] use of the n-word changed his subjective experience of the workplace" and therefore failed in his hostile work environment claim); *Casillas v. Madison Avenues Associates, Inc.*, 926 F.3d 329 (7th Cir. 2019) (en banc) (finding, over three judges' dissent, no standing for debtor bringing class action lawsuit against debt-collection company). See also Elizabeth C. Tippet, *How Amy Coney Barrett Might Rule For—and Against—Workers' Rights*, FAST COMPANY (Oct. 9, 2020), <https://www.fastcompany.com/90562608/how-amy-coney-barrett-might-rule-for-and-against-workers-rights>.

³⁸⁵ Peter Alexander, Garrett Haake & Adam Edelman, *Trump Has Decided to Select Amy Coney Barrett for the Supreme Court*, NBC NEWS (Sept. 25, 2020), <https://www.nbcnews.com/politics/supreme-court/trump-has-decided-select-amy-coney-barrett-supreme-court-n1241130>.

³⁸⁶ See Moiz Syed, *Charting the Long-Term Impact of Trump's Judicial Appointments*, PROPUBLICA (Oct. 30, 2020), <https://projects.propublica.org/trump-young-judges/>.

³⁸⁷ Seung Min Kim, *Trump's Conservative Imprint on the Federal Judiciary Gives Democrats a Playbook — If They Win*, WASHINGTON POST (Oct. 26, 2020, 4:22 PM), https://www.washingtonpost.com/politics/courts_law/court-barrett-senate-trump/2020/10/25/d9eed9c0-16bc-11eb-befb-8864259bd2d8_story.html.

³⁸⁸ Tom McCarthy, *Trump's Judges: A Revolution to Create a New Conservative America*, THE GUARDIAN, <https://www.theguardian.com/us-news/2020/apr/28/donald-trump-judges-create-new-conservative-america-republicans> (last visited Mar. 1, 2021).

³⁸⁹ See Part I *supra*.

democracy.³⁹⁰ This cadre of extreme right-wing judges and justices can rule in ways that protect the wealthy against most Americans.³⁹¹

Part IV: The Future?

Will the recent results of the presidential and senatorial elections stop the erosion of American democracy? Will it erode the influence of far-right libertarian corporations and individuals?

As developed above, the Democratic Party's policies are far closer to majoritarian sentiment than are those of the Republican Party.³⁹² Given that most Americans are likely to agree with positions supported by Democrats and reject positions advanced by Republicans, one needs to ask how that can be. But the answer is not hard to find. As discussed above, the Republicans' move to the far right has been orchestrated by powerful economic interests.³⁹³ The Koch brothers, the Olin Foundation, the Bradley Foundation, and other extremely wealthy Republican donors have dictated the agenda.³⁹⁴ That agenda dates to the 1950s.³⁹⁵ Charles Koch and others have funded organizations like the Federalist Society that has pushed rightwing judicial views.³⁹⁶ Indeed, the Federalist Society has endorsed almost all Trump appointees to the bench, a trend dating back to the Reagan era.³⁹⁷

³⁹⁰ See Part IV *infra*.

³⁹¹ Adam Cohen, How the Supreme Court Favors the Rich and Powerful, *Time* (Mar. 3, 2020, 7:00 AM EST), <https://time.com/5793956/supreme-court-loves-rich/>.

³⁹² See Part II *supra*.

³⁹³ See generally MAYER, *supra* note 245; NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* (2018).

³⁹⁴ MAYER, *supra* note 245, at 11-15.

³⁹⁵ See MAYER, *supra* note 245, at 33-72.

³⁹⁶ MAYER, *supra* note 245, at 134-35. See generally MICHAEL AVERY & DANIELLE McLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (Vanderbilt U. Press, 2013); Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62(2) *POL. RES. Q.* 366, 366-78 (2009).

³⁹⁷ See David Montgomery, *Conquerors of the Courts*, *WASH. POST* (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/>.

Beyond the judiciary, Koch and others on the right have funded think tanks.³⁹⁸ Their goals have been transparent to anyone looking at their agenda. Many views—rejected for years by establishment Republicans as extreme—now have support from the mainline Republican Party.³⁹⁹ Contemporary Republican tax policy,⁴⁰⁰ environmental policy,⁴⁰¹ and hostility to agency regulations all reflect the views of the far right.⁴⁰²

One might ask how a party that represents a minority of Americans on so many important policies can maintain control of the White House and often other branches of the federal government. The answer is not complicated: the unholy compromises that helped pass our Constitution now are eroding democracy in the United States.⁴⁰³

The Senate presents a clear picture of an undemocratic institution. States like Wyoming with total populations smaller than several cities in larger states like California have the same number of Senators.⁴⁰⁴ As developed above, as the Senate has abandoned norms that moderated the Senate towards the middle, the structure of the Senate has accentuated its anti-democratic nature.⁴⁰⁵ But there is more.

³⁹⁸ See MAYER, *supra* note 245, at 107-08.

³⁹⁹ *Id.* at 108.

⁴⁰⁰ See *Republican Party Platform*, *supra* note 267, at 2 (“We propose to level the international playing field by lowering the corporate tax rate to be on a par with, or below, the rates of other industrial nations.”).

⁴⁰¹ See *id.* at 20-22 (characterizing EPA as a “regulatory juggernaut” in thrall to “environmental extremists” and stifling “progress”).

⁴⁰² See *id.* at 27-28 (“Over-regulation is the quiet tyranny of the ‘Nanny State.’”).

⁴⁰³ See PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT* 3-58 (rev. ed. 2006) (discussing the framing of the Constitution, the Great Compromise over slavery, the debate over the Bill of Rights); Mitchell W. Berger & Zachary P. Hyman, *The Electoral College: Appendicitis of American Democracy*, 43 *NOVA L. REV.* 111, 113-24 (2019) (discussing the Constitutional Convention, the Three-Fifths Compromise, and the origins of the Electoral College).

⁴⁰⁴ See *QuickFacts Wyoming*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/WY>; *QuickFacts California*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/CA/PST045219> (estimated total population of Wyoming: 578,759; estimated total population of California: 39,512,223).

⁴⁰⁵ See Richard N. Rosenfeld, *What Democracy? The Case for Abolishing the United States Senate*, *HARPER’S MAGAZINE* (May 2004), <https://harpers.org/archive/2004/05/what-democracy-the-case-for-abolishing-the-united-states-senate/>.

The first President Bush was the last Republican to win the popular vote.⁴⁰⁶ His son and Trump won because of the Electoral College.⁴⁰⁷ The Electoral College skews the election to Republicans because many smaller states have disproportionate sway in deciding the election.⁴⁰⁸ Combine that with the fact that Bush and Trump have together appointed five justices to the Supreme Court.⁴⁰⁹ In turn, that Court has lurched to the right in ways that advance the minority party's interests.⁴¹⁰ Indeed, many of the Court's rulings are out of the extreme right wing's playbook.

The Court's infamous 5-4 decision in *Citizens' United* nominally gave unions and corporations the ability to give unlimited contributions to presidential candidates.⁴¹¹ Corporate donations far exceed union contributions to political campaigns, in part, because union membership is on the decline.⁴¹² That decline too is part of the rightwing agenda, as reflected in the Court's 5-4 decision in *Janus v. AFSCME*.⁴¹³ *Janus* held that requiring non-union public-

⁴⁰⁶ Aaron O'Neill, *Share of Electoral and Popular Votes by Each United States President 1789-2020*, STATISTA (Dec. 16, 2020), <https://www.statista.com/statistics/1034688/share-electoral-popular-votes-each-president-since-1789/>.

⁴⁰⁷ Associated Press, *Losing The Popular Vote, Winning The Electors And Other Electoral College Questions Answered*, WBUR (Nov. 4, 2020), <https://www.wbur.org/news/2020/11/04/electoral-college-deadline-popular-vote-presidency>.

⁴⁰⁸ See Berger & Hyman, *supra* note 12, at 135-39; Barney Warf, *The U.S. Electoral College and Special Biases in Voter Power*, 99(1) ANNALS ASS'N AM. GEOGRAPHERS 184, 190-97 (2009). See also Ethan J. Leib & Eli J. Mark, *Democratic Principle and Electoral College Reform*, 106 MICH. L. REV. FIRST IMPRESSIONS 105, 105-06 (2007) (In 1988, for example, the combined... population, 3,119,000 of the seven least populous jurisdictions of Alaska, Delaware, the District of Columbia, North Dakota, South Dakota, Vermont, and Wyoming carried the same voting strength in the Electoral College... as the 9,614,000 persons... in the State of Florida.”).

⁴⁰⁹ *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx (last visited Feb. 13, 2021) (President George W. Bush appointed Chief Justice Roberts and Associate Justice Alito; President Trump appointed Associate Justices Gorsuch, Kavanaugh, and Barrett.).

⁴¹⁰ See generally ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA* (2020); ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018); MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* (2016).

⁴¹¹ *Citizens United v. Fed. Election Commission*, 558 U.S. 310, 365 (2010).

⁴¹² See Chris Maisano, *Labor Union Membership Has Just Hit an All-Time Low. We Need to Reverse This Trend*, JACOBIN (Jan. 23, 2020), <https://jacobinmag.com/2020/1/labor-union-membership-density-bls-2019>.

⁴¹³ 585 U.S. ___, 138 S.Ct. 2448 (2018).

sector employees to pay union fees—to support the collective bargaining efforts that directly benefit them despite their non-membership in the union—violates their First Amendment rights.⁴¹⁴ Uncertain is the extent of damage that *Janus* has caused unions; but anti-union hostility lurks close to the surface in such a decision.⁴¹⁵ During the time when more traditional conservatives were on the bench, including Justices O’Connor and Powell, such an unusual view of the First Amendment did not hold sway.⁴¹⁶

Even more important than allowing wealthy donors to dominate political debate by pouring billions of dollars into each election cycle⁴¹⁷ are the Court’s voting rights decisions.

The film *Selma*, and the death of revered Civil Rights leader John Lewis, gave Americans a reminder about events leading to the passage of the 1965 Voting Rights Act—if they needed such a reminder.⁴¹⁸ Voter suppression in the United States, especially in the Jim Crow South, has an ugly, ugly history in the United States.⁴¹⁹ For almost 50 years, the Act helped check voter suppression around the country.⁴²⁰ So well-established was the statute that, as recently as 2006, about 90% of the members of the House voted in favor of the law’s renewal.⁴²¹ The law passed

⁴¹⁴ 138 S.Ct. at 2460.

⁴¹⁵ See 138 S.Ct. at 2471 (“The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights.”).

⁴¹⁶ See, e.g., 138 S.Ct. at 2492-93 (Kagan, J., dissenting) (discussing the Court’s previous caselaw dealing with the First Amendment in the public employment context, where “Time and again our cases have recognized that the Government has a much freer hand” in dealing with its employees than with “citizens at large.”).

⁴¹⁷ See Nicholas Confessore, *Koch Brothers’ Budget of \$889 Million for 2016 Is on Par With Both Parties’ Spending*, N.Y. TIMES (Jan. 26, 2015), <https://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html>.

⁴¹⁸ SELMA (Pathé 2014). See also Katherine Q. Seelye, *John Lewis, Towering Figure of Civil Rights Era, Dies at 80*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/us/john-lewis-dead.html>.

⁴¹⁹ See generally CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018). See also MICHELLE ALEXANDER, THE NEW JIM CROW 30-40 (2010) (discussing the legal and cultural campaigns instituted during Jim Crow years to subjugate, scapegoat, and terrorize Americans of African descent in the South).

⁴²⁰ See generally ANDERSON, *supra* note 419; GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2013).

⁴²¹ David Stout, *House Votes to Renew Voting Rights Act*, N.Y. TIMES (July 13, 2006), <https://www.nytimes.com/2006/07/13/washington/13cnd-vote.html>.

by 98-0 in the Senate.⁴²² The level of support masked Republican arguments that the law treated states, especially in the South, unfairly.⁴²³

Justices like Justice Scalia argue in favor of originalism by claiming it prevents nine unelected justices from undercutting the political process and the actions of elected representatives.⁴²⁴ Yet somehow, during oral argument in *Shelby County v. Holder*, the fact that such an overwhelming percentage of those in Congress voted for the re-adoption of the law in 2006 was a reason for the Court to distrust the legislation, according to Scalia.⁴²⁵ The 5-4 decision striking down parts of the Voting Rights Act based on a theory of state sovereignty takes some explaining to many of us.⁴²⁶

Despite extensive hearings and finding by Congress in passing the 2006 Act, the Chief Justice disputed any need for the Act in *Shelby County*.⁴²⁷ The majority acknowledged the good results from the act but, substituted their views for those of elected representatives regarding the continued need for the act.⁴²⁸ The Chief Justice's opinion made little effort to argue that the Court's constitutional reading was part of the Framers' original understanding.⁴²⁹ He referred to sovereignty, reflected in the Tenth Amendment.⁴³⁰ But, of course, the Voting Rights Act was

⁴²² Carl Hulse, *By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES (July 21, 2006), <https://www.nytimes.com/2006/07/21/washington/21vote.html>.

⁴²³ See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L. J. 174, 191 (2007).

⁴²⁴ See, e.g., Antonin Scalia, *Originalism, The Lesser Evil*, 57 U. CINN. L. REV. 849, 863-64 (1989).

⁴²⁵ Oral Argument at 17:22, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96), <https://www.oyez.org/cases/2012/12-96>.

⁴²⁶ See, e.g., Jeffrey Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 219-237 (2016). *But see* Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 177 (2013) (equal sovereignty doctrine has "no basis in constitutional text or in existing constitutional doctrine").

⁴²⁷ 570 U.S. 529, 547-550 (2013).

⁴²⁸ *Id.* at 535 ("There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.").

⁴²⁹ *Id.* at 543.

⁴³⁰ *Id.* at 542-45.

grounded in the Fifteenth Amendment, which by any ordinary understanding superseded or limited the Tenth Amendment.⁴³¹

One doubts that a good “original understanding” argument supported the majority’s opinion.⁴³² Originalist Clarence Thomas concurred in the Chief Justice’s opinion.⁴³³ He referred to “basic principles of federalism” and separate sovereignty, which, according to the majority and Thomas, supported the holding.⁴³⁴ Somehow, Thomas managed to entirely ignore the Civil War and the effect of the Civil War amendments on those principles.⁴³⁵ And whatever claim one might make that originalism would restrain justices from substituting their views for elected officials was ludicrous in *Shelby County*: elected officials overwhelmingly supported the Act.⁴³⁶

Some commentators like George Will claimed that the law was outdated.⁴³⁷ That, of course, is not a constitutional argument—at least not one recognized by the rightwing of the Court. Justice Scalia, among others, showed scorn for Justices like Justice Brennan, who argued in favor of a living constitution.⁴³⁸

⁴³¹ See *id.* at 567-68 (Ginsburg, J., dissenting).

⁴³² See Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking Down the Law Is All About Conservatives’ Imagination.*, SLATE (June 26, 2013), <https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html> (“[A]part from the spurious principle of equal sovereignty, all that the majority had on which to base its decision was tenderness for ‘states’ rights.”). See generally James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote* *Shelby County v. Holder*, 8 HARV. L. POL’Y REV. 39 (2014); Joel Heller, *Shelby County and the End of History*, 44 U. MEM. L. REV. 357 (2013).

⁴³³ 570 U.S. at 557-559 (Thomas, J., concurring).

⁴³⁴ *Id.* at 558.

⁴³⁵ See *id.* at 567-68 (Ginsburg, J., dissenting).

⁴³⁶ Stout, *supra* note 421; Hulse, *supra* note 422.

⁴³⁷ George Will, Opinion, *George Will: Supreme Court is Correct on Voting Rights Act*, WASH. POST (June 26, 2013), https://www.washingtonpost.com/opinions/george-will-supreme-court-is-correct-on-voting-rights-act/2013/06/26/b15c8d84-de81-11e2-b797-cbd4cb13f9c6_story.html.

⁴³⁸ See Kirsten D. Levingston, *Defending Our “Living Constitution”*, BRENNAN CTR. JUST. (Mar. 14, 2008), <https://www.brennancenter.org/our-work/analysis-opinion/defending-our-living-constitution>.

As soon as the Court decided *Shelby County v. Holder*, Republicans ramped up extraordinary efforts to suppress the vote.⁴³⁹ Republican legislatures in Southern states moved quickly to enact strict voter-ID laws,⁴⁴⁰ reduce or eliminate early voting processes,⁴⁴¹ shut down polling places in minority communities,⁴⁴² and aggressively purge voter rolls.⁴⁴³ These extreme voter-suppression efforts were (are still are) defended as supposedly necessary to combat purportedly-widespread voter fraud.⁴⁴⁴ The tactics also all disproportionately effect minority

⁴³⁹ See *The Effects of Shelby County v. Holder*, BRENNAN CTR. JUST. (Aug 6, 2018),

<https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.

⁴⁴⁰ See, e.g., Philip Bump, *Voter ID Laws in Kansas and Tennessee Dropped 2012 Turnout by Over 100,000 Votes*, WASH. POST (Oct. 9, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/10/09/gao-voter-id-laws-in-kansas-and-tennessee-dropped-2012-turnout-by-over-100000-votes/>.

⁴⁴¹ Penda Hair, *Why North Carolina is the New Selma*, MSNBC (Mar. 5, 2015), <https://www.msnbc.com/msnbc/why-north-carolina-the-selma-2015-msna544001>.

⁴⁴² Tom McCarthy, *More Than 1,000 U.S. Polling Sites Closed Since Supreme Court Ruling, Report Finds*, GUARDIAN (Sept. 11, 2019), <https://www.theguardian.com/us-news/2019/sep/11/us-polling-sites-closed-report-supreme-court-ruling>; Elena Mejia Lutz, *Report: Texas Has Closed Most Polling Places Since Court Ruling*, TEX. TRIBUNE (Nov. 4, 2016), <https://www.texastribune.org/2016/11/04/report-texas-holds-highest-number-polling-place-cl/>.

⁴⁴³ Susan Ferriss, *Georgia Hotbed for Voter Suppression Tactics*, CTR. PUB. INTEGRITY (Oct. 19, 2020), <https://publicintegrity.org/politics/elections/us-polling-places/georgia-hotbed-for-voter-suppression-tactics/>.

⁴⁴⁴ No evidence has ever been presented to support such claims of widespread voter fraud. See Justin Grimmer, Haritz Garro & Andrew C. Eggers, *No Evidence for Voter Fraud: A Guide to Statistical Claims About the 2020 Election*, HOOVER INST. (Feb. 3, 2021), <https://www.hoover.org/research/no-evidence-voter-fraud-guide-statistical-claims-about-2020-election>; Jim Rutenberg, *The Attack on Voting: How President Trump's False Claim of Voter Fraud is Being Used to Disenfranchise Americans*, N.Y TIMES MAGAZINE (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/magazine/trump-voter-fraud.html>; Sami Edge & Sean Holstege, *Study Finds No Evidence of Widespread Voter Fraud*, NBC NEWS (Aug. 26, 2016), <https://www.nbcnews.com/news/us-news/study-finds-no-evidence-widespread-voter-fraud-n637776>; Sarah Childress, *Why Voter ID Laws Aren't Really about Fraud*, PBS FRONTLINE (Oct. 20, 2014), <https://www.pbs.org/wgbh/frontline/article/why-voter-id-laws-arent-really-about-fraud/>.

communities of color.⁴⁴⁵ Shortly before the election, appellate courts consistently sided with the Trump administration in upholding efforts to suppress the vote.⁴⁴⁶

Remarkably, so too did the Supreme Court. For example, in a 5-3 decision eight days before the election, the rightwing of the Court rejected efforts to extend the deadline for mail-in ballots in Wisconsin.⁴⁴⁷ (I say “remarkably” because one would think that Justices under such close scrutiny for bias would avoid such an obvious appearance of helping to tip the election to Trump.) Many commentators on the left, including E.J. Dionne, have called for expanding the Court due to its questionable legitimacy—particularly considering the Senate’s unwillingness to conduct hearings for Merrick Garland while ramming through Amy Coney Barrett’s nomination.⁴⁴⁸

Even closer to the election, the Court refused to hear a challenge from Pennsylvania Republicans to a decision allowing election officials to consider ballots received up to three days after election day.⁴⁴⁹ It also let stand lower court rulings from North Carolina, also extending the

⁴⁴⁵ See Matt DiRienzo, *Analysis: New and Age-old Voter Suppression Tactics at the Heart of the 2020 Power Struggle*, BRENNAN CTR. JUST. (Oct. 28, 2020), <https://publicintegrity.org/politics/elections/ballotboxbarriers/analysis-voter-suppression-never-went-away-tactics-changed/>; Terry Gross, *Fresh Air: Republican Voter Suppression Efforts Are Targeting Minorities*, *Journalist Says*, NAT'L PUB. RADIO (Oct. 23, 2018), <https://www.npr.org/2018/10/23/659784277/republican-voter-suppression-efforts-are-targeting-minorities-journalist-says>; Jim Rutenberg, *A Dream Undone: Inside the 50-year Campaign to Roll Back the Voting Rights Act*, N.Y. TIMES MAGAZINE (July 29, 2015), <https://www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html>; Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote?*, ATLANTIC (Jan. 10, 2014), <https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/>.

⁴⁴⁶ Jim Rutenberg & Rebecca R. Ruiz, *Federal Appeals Courts Emerge as Crucial for Trump in Voting Cases*, N.Y. TIMES (Oct. 17, 2020), <https://www.nytimes.com/2020/10/17/us/politics/federal-appeals-courts-trump-voting.html>.

⁴⁴⁷ *Democratic Nat'l Comm. v. Wis. State Legis.*, 592 U.S. ___, No. 20A66 (Oct. 26, 2020). See Stef W. Kight & Rebecca Falconer, *Supreme Court Rejects Request to Extend Wisconsin Absentee Ballot Deadline*, AXIOS (Oct. 27, 2020), <https://www.axios.com/supreme-court-wisconsin-absentee-0a921c1f-1f29-4b18-a40d-8601cce7995a.html>.

⁴⁴⁸ E.g., E.J. Dionne Jr., Opinion, *Enlarging the Supreme Court Is the Only Answer to the Right's Judicial Radicalism*, WASH. POST (Oct. 25, 2020), https://www.washingtonpost.com/opinions/the-high-cost-of-confirming-amy-coney-barrett/2020/10/24/8d5a236a-156f-11eb-bc10-40b25382f1be_story.html.

⁴⁴⁹ Robert Barnes, *Democrats in Pennsylvania, North Carolina Claim Key wins at Supreme Court Ahead of Election*, WASH. POST (Oct. 29, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-pennsylvania-mail-ballots/2020/10/28/fe78439a-1936-11eb-82db-60b15c874105_story.html.

deadline for counting votes.⁴⁵⁰ While that may signal the Court’s hesitation to decide the election, three hard-right justices, Thomas, Alito, and Gorsuch, indicated that they believe a review of the issues raised in the North Carolina cases post-election is appropriate.⁴⁵¹ Barrett refused to signal whether she would recuse herself, given her recent appointment by Trump, under questionable circumstances.⁴⁵²

Since 2000, the Republicans have succeeded in achieving their power, in large part, via voter suppression.⁴⁵³ Similar attempts failed in 2020, in part because so many mainline Republicans abandoned the President.⁴⁵⁴ But with a 6-3 extreme rightwing lock on the Court—and over two hundred recently-appointed lower court judges⁴⁵⁵—one can anticipate continued help from the Judicial branch.

In the past, the Court has gotten too far out in front of public opinion, as the Warren Court did in deciding cases like *Miranda v. Arizona*.⁴⁵⁶ But the Court changed direction. In 1968,

⁴⁵⁰ *Id.*

⁴⁵¹ *Moore v. Circosta*, 592 U.S. ___, No. 20A72 (Oct. 28, 2020).

⁴⁵² Barnes, *Democrats in Pennsylvania*, *supra* note 429.

⁴⁵³ See DiRienzo, *New and Age-old Voter Suppression Tactics*, *supra* note 445; David Daley, *Inside the Republican Plot for Permanent Minority Rule*, NEW REPUBLIC (Oct. 15, 2020), <https://newrepublic.com/article/159755/republican-voter-suppression-2020-election>; Joanna Walters & Assoc. Press, *Top Trump Adviser: Republicans Have 'Always' Relied on Voter Suppression*, GUARDIAN (Dec. 21, 2019), <https://www.theguardian.com/us-news/2019/dec/21/trump-adviser-republicans-voter-suppression>.

⁴⁵⁴ *E.g.*, Catie Edmondson, *Fearing a 'Blood Bath,' Republican Senators Begin to Edge Away From Trump*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/us/politics/republican-senators-trump.html>.

⁴⁵⁵ See Carrie Johnson, *Wave Of Young Judges Pushed By McConnell Will Be 'Ruling For Decades To Come'*, NAT’L PUB. RADIO (July 2, 2020), <https://www.npr.org/2020/07/02/886285772/trump-and-mcconnell-via-swath-of-judges-will-affect-u-s-law-for-decades>.

⁴⁵⁶ Many Americans were troubled by the Court’s decisions regarding criminals’ constitutional rights, with many believing the Court was too lenient on criminal defendants. See Hazel Erskine, *The Polls: Causes of Crime*, 38 PUB. OPINION Q. 288, 292 (1974) (listing 1969 Louis Harris & Assoc. poll showing 51% and 23% of Americans believed “Supreme Court decisions protecting rights of accused” were a “Major Cause” and “Minor Cause” of “an increase in crime,” respectively), and at 294 (detailing a Gallup poll showing 63% of Americans in 1968, and 75% of Americans in 1969, believed “the courts” were “not harsh enough” when “dealing with criminals.”).

Nixon ran, in part, against the Court, and between 1969 and 1971 he made four appointments to the Court.⁴⁵⁷ That began erosion of many Warren Court criminal procedure holdings.⁴⁵⁸

Or consider the rightwing Court during FDR's first term in office, a Court that struck down laws aimed at addressing economic woes brought on by the Great Depression.⁴⁵⁹ Roosevelt proposed legislation that would increase the size of the Court to counterbalance its far-right leanings.⁴⁶⁰ The court-packing plan failed, but the Court changed direction, beginning with centrist-Justice Owen Roberts' willingness to uphold progressive legislation and FDR's opportunity to appoint several justices during his presidency.⁴⁶¹

Hope for similar changes in the contemporary Court is naïve. As argued above, the Republicans' ability to suppress the vote and the Court's willingness to uphold those efforts make chances for future strong showings by the Democratic Party difficult.⁴⁶² Even then, short of legislation packing the Court, the current members of the Court do not seem poised to change their views. Some commentators saw a few of Chief Justice Roberts' opinions as demonstrating a willingness to protect the institution of the Court by steering towards the middle.⁴⁶³ Some commentators questioned whether Roberts was moderating his views.⁴⁶⁴ Even if Roberts were to

⁴⁵⁷ FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 153–193 (1970).

⁴⁵⁸ COHEN, *supra* note 410, at 270-284; GRAETZ & GREENHOUSE, *supra* note 261, at 42-54.

⁴⁵⁹ IRONS, *supra* note 261, at 294-306 (discussing this period of the Court's history, including *Panama Refining v. Ryan*, 293 U.S. 388 (1935), *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

⁴⁶⁰ *Id.* at 312-17.

⁴⁶¹ *Id.* at 316-29.

⁴⁶² See Perry Bacon, Jr., *The Latest On Republican Efforts To Make It Harder To Vote*, FIFETHIRTYEIGHT (Sept. 9, 2020), <https://fivethirtyeight.com/features/the-latest-on-republican-efforts-to-make-it-harder-to-vote/>.

⁴⁶³ See, e.g., Stuart Gerson, *Understanding John Roberts: A Conservative Institutional Concerned with Durability of the Law and Respect for the Court*, JURIST (July 31, 2020), <https://www.jurist.org/commentary/2020/07/stuart-gerson-understanding-john-roberts/>; Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, ATLANTIC (July 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/>; Adam Liptak, *John Roberts Was Already Chief Justice. But Now It's His Court*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html>;

⁴⁶⁴ See, e.g., Victoria Bassetti, *John Roberts Is an Institutional, Not a Liberal*, FIN. TIMES (July 1, 2020), <https://www.ft.com/content/2248b2e3-b911-48ec-9eeb-632c0c26ab16>;

shift towards a more centrist judicial philosophy, McConnell’s success in preventing Garland’s appointment to the Court—and his and Graham’s remarkably hypocritical switch in time to appoint far-right Justice Barrett—assures a young and solidly far-right Court into the future.⁴⁶⁵

The challenges are real. To overcome them, Democrats may ram through a Court-packing law to realign the balance on the Court. Or, even as urged by co-founder of the Federalist Society Steven Calabresi, the Constitution could be amended to impose term-limits on members of the Court.⁴⁶⁶ Neither idea is a shoo-in.⁴⁶⁷

Perhaps the Court will overrule *Roe v. Wade*.⁴⁶⁸ That might lessen support among religious voters who oppose abortion but who are uncomfortable with other Republican policies. For example, some Catholic voters have supported the Republican Party because of abortion, but voice concern about lack of support for families in need.⁴⁶⁹ Perhaps the Democratic Party will increase its majority in Congress. The 2022 Senatorial race seems to favor Democrats.⁴⁷⁰ But, given the reality that the Court can easily tip the balance in favor of the Republican Party by

⁴⁶⁵ See Russell Wheeler, *McConnell’s Fabricated History to Justify a 2020 Supreme Court Vote*, BROOKINGS INST. (Sept. 24, 2020), <https://www.brookings.edu/blog/fixgov/2020/09/24/mcconnells-fabricated-history-to-justify-a-2020-supreme-court-vote/>.

⁴⁶⁶ Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 772 (2006) (arguing for a Constitutional amendment “instituting a system of staggered, eighteen-year term limits for Supreme Court Justices”).

⁴⁶⁷ During the campaign, Biden tried to avoid weighing in on packing the Court, suggesting that the question is a political hot potato. See Barbara Sprunt, *Biden Campaign Continues To Deflect On Court-Packing*, NAT’L PUB. RADIO (Oct. 11, 2020), <https://www.npr.org/2020/10/11/922806310/biden-campaign-continues-to-deflect-on-court-packing>. FDR’s plan cost him substantial support in his own party. A constitutional amendment to add term limits would face an uphill battle: small states are not likely to give up their advantage in gaining access to power through the Court.

⁴⁶⁸ 410 U.S. 113 (1973) (affirming a fundamental right to privacy that protects a pregnant woman’s choice over whether or not to have an abortion).

⁴⁶⁹ See Michael Lipka & Gregory A. Smith, *Like Americans Overall, U.S. Catholics Are Sharply Divided by Party*, PEW RES. CTR. (Jan. 24, 2019), <https://www.pewresearch.org/fact-tank/2019/01/24/like-americans-overall-u-s-catholics-are-sharply-divided-by-party/>.

⁴⁷⁰ Louis Jacobson, *The Future Shape of the Senate*, UNIV. VA. CTR. POL. (July 16, 2020), <https://centerforpolitics.org/crystalball/articles/the-future-shape-of-the-senate/>.

upholding its efforts at voter suppression, or by advancing other minority policies supported by Republicans, like gun-rights, our democracy is in for a rough road ahead.