

TRUMP'S LEGACY:  
THE LONG-TERM RISKS TO AMERICAN DEMOCRACY

by  
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*While President Trump was extreme in his contempt for legal and political norms, his presidency was consistent with the direction in which the Republican Party has moved over the past several decades. Strategies put in place by Trump and other Republicans, along with institutional aspects of our country's "democracy," assure the Republican Party's continued, outsized control despite Trump's failure to achieve a second term.*

*This Article reviews Trump and his Administration's contempt for political norms, explores the Republican Party's hard turn to the right, and discusses how the Republicans have been able to hold onto power greater than one would expect considering that it is the distinct minority party. Finally, the Article examines whether the sharp trend to the right might be slowed, proposing re-instituting the filibuster and formalizing the "blue slip" process for judicial appointments.*

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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.<sup>1</sup> Prior to the 2020 election, several prominent Republicans and traditional conservatives announced their opposition to Trump.<sup>2</sup> They saw him as a radical departure from mainstream Republicanism.<sup>3</sup> Their views fed a narrative: Trump's contempt for political norms would be short-lived, ending with his defeat on November 3.<sup>4</sup> Because so many Americans saw him as a threat to democracy, one could hear a collective sigh of relief when he lost in November.<sup>5</sup> For many Americans, the election proved

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<sup>1</sup> For example, Hillary Clinton's unfavorable ratings 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/>.

<sup>2</sup> 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 (July 17, 2020, 8:10 AM), <https://www.vox.com/2020/7/17/21316641/trump-lincoln-project-gop-2020>. Others, including prominent Republicans Colin Powell, Carly Fiorina, 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 (Oct. 20, 2020), <https://www.axios.com/republicans-not-voting-for-trump-in-2020-9e2f02fa-0f36-418d-bedd-ed53181dd99c.html>; Annie Karni, *The Crowded, Competitive World of Anti-Trump G.O.P. Groups*, N.Y. TIMES, <https://www.nytimes.com/2020/10/12/us/politics/never-trump-republicans.html> (Jan. 21, 2021).

<sup>3</sup> See Knutson & Ayesh, *supra* note 2; Karni, *supra* note 2; Schieffer, *Trump Candidacy Is Radical Departure in Party in 'Identity Crisis'*, CBS N.Y. (July 18, 2016, 11:32 PM), <https://www.cbsnews.com/newyork/news/schieffer-trump-gop-analysis/>.

<sup>4</sup> Karni, *supra* note 2; see also Edward-Isaac Dove, *She Wanted to Be a Republican President. She's Voting for Biden.*, ATLANTIC (June 25, 2020), <https://www.theatlantic.com/politics/archive/2020/06/carly-fiorina-vote-biden/613474/>; Stephen Collinson, *Trump's Legal Absurdities Force More Republicans to Speak out*, CNN, <https://www.cnn.com/2020/11/23/politics/donald-trump-republicans-transition/index.html> (Nov. 23, 2020, 10:04 AM); Matthew Walther, *Republicans Are Thrilled to Lose*, WEEK (Oct. 24, 2020), <https://theweek.com/articles/945592/republicans-are-thrilled-lose>; Richard Luscombe, *Republicans Express Fears Donald Trump Will Lose Presidential Election*, GUARDIAN (Oct. 11, 2020, 3:10 AM), <https://www.theguardian.com/us-news/2020/oct/10/republicans-presidential-election-fears-biden-trump>.

<sup>5</sup> See Nicole Lafond & Cristina Cabrera, *Jubilance in the Streets: America Erupts in Celebration After Trump's Loss*, TALKING POINTS MEMO (Nov. 7, 2020, 2:28 PM), <https://talkingpointsmemo.com/news/jubilance-streets-america-erupts-celebration-trump-loss>; Zack Budryk, *Americans Happier About Trump Loss than Biden Win: Poll*, HILL (Nov. 18, 2020, 11:43 AM), <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, <https://www.cnn.com/2020/11/10/media/late-night-election-trump-colbert>.

the viability of our institutions and the restoration of our democracy.<sup>6</sup>

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

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.<sup>11</sup> 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 America's "democracy,"<sup>12</sup> will allow

kimmel/index.html (Nov. 10, 2020, 10:22 AM).

<sup>6</sup> Lafond & Cabrera, *supra* note 5.

<sup>7</sup> *Infra* Part I.

<sup>8</sup> See Brett Wilkins, *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 (July 5, 2019, 5:05 AM), <https://www.salon.com/2019/07/05/how-did-the-republican-party-become-so-conservative/>; Christopher Ingraham, *This Astonishing Chart Shows How Moderate Republicans Are an Endangered Species*, WASH. POST (June 2, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/02/this-astonishing-chart-shows-how-republicans-are-an-endangered-species/>; cf. Sahil Chinoy, *Opinion, 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> (showing that the Republican Party has been far to the right for the past two decades).

<sup>9</sup> Rozsa, *supra* note 8; Ingraham, *supra* note 8.

<sup>10</sup> See generally JACOB S. HACKER & PAUL PIERSON, *LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY* (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 Article, 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. See Jane Mayer, *The Big Money Behind the Big Lie*, NEW YORKER, Aug. 9, 2021, at 30.

<sup>11</sup> *Infra* Part II.

<sup>12</sup> 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.

a party dominated by a shrinking minority of wealthy white Americans to maintain control inconsistent with their percentage in the electorate.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> Other reasons for the Republicans' hold on power are less visible. This Article explores some of those reasons.<sup>16</sup> Importantly, though, many Americans fail to see what is happening in plain sight. Many swing voters who pride themselves for their independence believe

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<sup>13</sup> *Infra* Part III; see Ed Kilgore, *A Dwindling Republican Party May Be Doomed to Shrink More*, N.Y. INTELLIGENCER (Apr. 8, 2021), <https://nymag.com/intelligencer/2021/04/fewer-americans-identify-as-republican-in-2021-gallup.html> (indicating that 49% of Americans report being Democrats or Democratic leaning versus only 40% report themselves to be Republicans or Republican leaning); Carol Anderson, *Republicans Want a White Republic. They'll Destroy America to Get It*, TIME (July 17, 2019), <https://time.com/5628283/trump-tweets-racist-white-america/> (indicating that the Republican Party's membership is nearly 90% white); Chase Peterson-Withorn, *Exclusive Forbes Survey of U.S. Billionaires on How They Will Vote for President*, FORBES (Oct. 20, 2020), <https://www.forbes.com/sites/chasewithorn/2020/10/20/even-americas-billionaires-are-tilting-toward-biden-in-the-2020-presidential-race/> (“The nation’s wealthiest are more likely to be Republican than the average American . . .”).

<sup>14</sup> Sarah Frostenson, *Republicans Now Control the Presidency, the Senate, and the House*, VOX (Nov. 9, 2016, 9:00 AM), <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> (Oct. 18, 2019); *Composition of Congress, by Political Party, 1855-2017*, INFOPLEASE, <https://www.infoplease.com/us/government/legislative-branch/composition-of-congress-by-political-party-1855-2017> (Feb. 28, 2017); Adam Liptak & Alicia Parlapiano, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html>; see also Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson & Jason Roberts, *The U.S. Supreme Court Justices Database*, WASH. UNIV. ST. LOUIS, <https://www.epstein.wustl.edu/justicesdata> (Jan. 17, 2021).

<sup>15</sup> Amanda Onion, *How the Great Compromise and the Electoral College Affects Politics Today*, HIST., <https://www.history.com/news/how-the-great-compromise-affects-politics-today> (Mar. 21, 2019); see also PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISION HAVE SHAPED OUR CONSTITUTION* 42 (rev. ed. 2006).

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

the common trope: sure, the Republican Party has moved to the right, but the Democratic Party has moved to the left.<sup>17</sup> The trope is only partly true: yes, the Republican Party has moved far to the right, well out of mainstream popular sentiment.<sup>18</sup> However, the Democratic Party, on issue after issue, is much closer to strong majoritarian sentiment.<sup>19</sup>

Part I reviews briefly Trump and his Administration's contempt for political norms.<sup>20</sup> It discusses how that contempt has led many prominent Republicans, almost all no longer in government, to abandon their support for his presidency.<sup>21</sup> Part II explores the Republican Party's hard turn to the far right.<sup>22</sup> It also deconstructs the trope that the Democratic Party has moved to the left by examining public opinion polling.<sup>23</sup> That examination demonstrates that the Democratic Party, on most major policy questions, is closer to majoritarian sentiment than is the Republican Party.<sup>24</sup> Part III turns to how through the Republicans' willingness to abandon specific political norms it has been able to hold on to power greater than

<sup>17</sup> See Marc Fisher, Christine Spolar & Amy B. Wang, *The Undecideds: Sure, Biden and Trump Are Very Different. But Maybe Neither is Right for the Job.*, WASH. POST (Sept. 28, 2020, 2:00 AM), <https://wapo.st/3jJqTaY>; Samara Klar & Yanna Krupnikov, Opinion, *How to Win Swing Voters (and How to Lose Them)*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/opinion/midterms-independents-swing-voters-.html> ("The characteristic anger and vitriol of partisan politics are turning [swing voters] away from party membership. Leaning independents have both the preferences and the interest to be reliable party supporters, but they are repulsed from doing so by the very idea of government as a battleground."); see also Emily Stewart, *Undecided Voters Explain Themselves*, VOX (Oct. 23, 2020, 11:00 AM), <https://www.vox.com/21528722/undecided-voters-2020-election-trump-biden>.

<sup>18</sup> Jelani Cobb, *What is Happening to the Republicans?*, NEW YORKER (March 15, 2021), <https://www.newyorker.com/magazine/2021/03/15/what-is-happening-to-the-republicans> (stating that "[t]he marginalization of moderate Republicans has accelerated in the past decade" and that the Republican Party's leadership "sees no popular incentive to move toward the center" of the political spectrum); Teri Kanefield, *Republican Rhetoric Is Getting More Extreme Because That's What the Base Demands*, WASH. POST (April 29, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/04/29/republican-rhetoric-extreme-base/> ("The Republican Party is caught in a spiral of radicalization: Having alienated moderates and corporate donors, some prominent GOP figures are turning to grass roots funding from the more radical segment of its base, which has led them to delve further into the conspiracy theories and dangerous rhetoric that their most passionate voters love but that drove centrists away."); see also Chinoy, *supra* note 8.

<sup>19</sup> Lane Kenworthy, *The Democratic Party Has Moved Left—But So Has the U.S. This Explains How and Why*, WASH. 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/>.

<sup>20</sup> *Infra* Part I.

<sup>21</sup> *Infra* Part I.

<sup>22</sup> *Infra* Part II.

<sup>23</sup> *Infra* Part II.

<sup>24</sup> *Infra* Part II.

one would expect, given that it is the distinct minority party.<sup>25</sup> Notably, even before Trump, the Republicans ensured the federal courts' hard shift to the right, a trend that is likely to continue the erosion of democracy well into the future.<sup>26</sup> Part IV examines whether the sharp trend to the right might slow and the trend's continuing risk to our democracy.<sup>27</sup>

## I. ABANDONING POLITICAL NORMS

### A. *A Trump Sampler*

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

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<sup>25</sup> *Infra* Part III.

<sup>26</sup> *Infra* Part III.

<sup>27</sup> *Infra* Part IV.

<sup>28</sup> See *Person: Donald Trump*, FACTCHECK.ORG, <https://www.factcheck.org/person/donald-trump/> (last visited June 2, 2022); *In Four Years, President Trump Made 30,573 False or Misleading Claims*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/trump-claims-database/> (Jan. 20, 2021); David Markowitz, *Trump Is Lying More than Ever: Just Look at the Data*, FORBES (May 5, 2020, 7:00 AM), <https://www.forbes.com/sites/davidmarkowitz/2020/05/05/trump-is-lying-more-than-ever-just-look-at-the-data>; George Packer, *A Political Obituary for Donald Trump*, ATLANTIC (Dec. 9, 2020), <https://www.theatlantic.com/magazine/archive/2021/01/the-legacy-of-donald-trump/617255/>; Glenn Kessler, Salvador Rizzo & Meg Kelly, *President Trump Has Made More than 20,000 False or Misleading Claims*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/politics/2020/07/13/president-trump-has-made-more-than-20000-false-or-misleading-claims/>.

<sup>29</sup> See, e.g., Adam Gabbatt, *No, Over There! Our Case-by-Case Guide to the Trump Distraction Technique*, 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*, U.S. NEWS & WORLD REP. (Aug. 9, 2019, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2019-08-09/president-trumps-distraction-strategy-could-be-fraying>; Kathleen Parker, *Opinion, Trump's Tweets Are a Distraction for Something Else He Doesn't Want Us to See*, WASH. POST (July 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](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 News*, S.F. CHRON. (Mar. 20, 2017), <https://www.sfchronicle.com/opinion/editorials/article/Donald-Trump-s-fake-scandal-distracts-from-real-11015600.php>; see also *Opinion, Everything Is a Distraction from Something Much, Much Worse*, WASH. POST (July 13, 2017), [https://www.washingtonpost.com/opinions/everything-is-a-distraction-from-something-much-much-worse/2017/07/13/a42384e0-6809-11e7-a1d7-9a32e91c6f40\\_story.html](https://www.washingtonpost.com/opinions/everything-is-a-distraction-from-something-much-much-worse/2017/07/13/a42384e0-6809-11e7-a1d7-9a32e91c6f40_story.html).

<sup>30</sup> Parker, *supra* note 29; see also *Everything Is a Distraction*, *supra* note 29.

Trump's counselor Kellyanne Conway popularized the idea of "alternative facts," early in Trump's Administration.<sup>31</sup> Picking up on that theme, Trump targeted the mainstream media.<sup>32</sup> His constant charge about "fake news" allowed his supporters to ignore serious challenges to his Administration.<sup>33</sup> While other presidents challenged media representatives on occasion, none made a wholesale effort to erode confidence in the mainstream media as did Trump.<sup>34</sup>

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.<sup>35</sup> His inconsistent and dangerous statements about COVID-

<sup>31</sup> Rebecca Sinderbrand, *How Kellyanne Conway Ushered in the Era of Alternative Facts*, WASH. POST (Jan. 22, 2017, 8:44 AM), <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>.

<sup>32</sup> 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 MORNING HERALD, <https://www.smh.com.au/world/alternative-facts-fake-news-and-trumps-war-on-mainstream-media-20170123-gtwwml.html> (Jan. 23, 2017).

<sup>33</sup> Danielle Kurtzleben, *With 'Fake News,' Trump Moves from Alternative Facts to Alternative Language*, NPR (Feb. 17, 2017, 8:27 PM), <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 SCI. MONITOR (Mar. 11, 2017), <https://www.csmonitor.com/USA/Politics/2017/0311/Trump-vs.-the-media-the-war-over-facts>.

<sup>34</sup> Kurtzleben, *supra* note 33; Kiely, *supra* note 33; Upson, *supra* note 33; Fiedler, *supra* note 33; *see also* Ryan Mattimore, *Presidential Feuds with the Media Are Nothing New*, HIST., <https://www.history.com/news/presidents-relationship-with-press> (Sept. 3, 2018). *But see* D.C. McAllister, *Sorry, Journalists: Trump Isn't the First President to Threaten the Press*, FEDERALIST (Jan. 24, 2017), <https://thefederalist.com/2017/01/24/sorry-journalists-trump-isnt-first-president-threaten-press/>.

<sup>35</sup> Daniel Dale & Tara Subramaniam, *Trump Made 33 False Claims About the Coronavirus Crisis in the First Two Weeks of March*, CNN, <https://www.cnn.com/2020/03/22/politics/fact-check-trump-coronavirus-false-claims-march/index.html> (Mar. 22, 2020, 6:59 PM); Matthew Rozsa, *The Science Is Clear: Trump Bungled the Pandemic Response*, SALON (June 3, 2020, 7:00 PM), <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, <https://www.cnn.com/2020/07/17/politics/donald-trump-leadership-coronavirus/index.html> (July 17, 2020, 8:17 AM); Joseph Gerth, *Mitch McConnell Admits that Trump Mishandled Coronavirus Response*, COURIER J., <https://www.courier-journal.com/story/news/local/joseph-gerth/2020/03/31/mitch-mcconnell-admits-trump-mishandled-coronavirus-pandemic/5095995002/>

19 resulted in unnecessary deaths.<sup>36</sup> Some of his followers mindlessly scorned the use of masks.<sup>37</sup> Many of his supporters contended that, based on Trump's statements, the media overstated the extent and risk of the virus.<sup>38</sup> Again, almost certainly, that kind of irresponsibility led to the unnecessary spread of the disease.<sup>39</sup> 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?<sup>40</sup>

Trump demonstrated a similar scorn for traditional political allies. Early and often, Trump attacked NATO and allies within NATO.<sup>41</sup> He made wild and often

(Apr. 1, 2020, 9:41 AM); David Remnick, *Trump, Truth, and the Mishandling of Coronavirus*, 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*, HILL (Mar. 13, 2020, 11:30 AM), <https://thehill.com/opinion/white-house/487401-trump-is-culpable-for-impacts-of-coronavirus>; Christian Paz, *All the President's Lies About the Coronavirus*, ATLANTIC, <https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/> (Nov. 2, 2020, 2:20 PM).

<sup>36</sup> Rozsa, *supra* note 35; Gerth, *supra* note 35; *see also* Justine Coleman, *Trump on Coronavirus Death Toll: 'It Is What It Is'*, HILL (Aug. 4, 2020, 7:44 AM), <https://thehill.com/policy/healthcare/510393-trump-on-coronavirus-death-toll-it-is-what-it-is>; Katelyn Burns, *Trump's 7 Worst Statements on the Coronavirus Outbreak*, VOX (Mar 13, 2020, 8:20 AM), <https://www.vox.com/policy-and-politics/2020/3/13/21176535/trumps-worst-statements-coronavirus>; David Leonhardt, *A Complete List of Trump's Attempts to Play Down Coronavirus*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html>.

<sup>37</sup> Amanda Marcotte, *Trump's War on Masks: It's Working—At Least with His Base*, SALON (May 18, 2020, 1:00 PM), <https://www.salon.com/2020/05/18/trumps-war-on-masks-its-working—at-least-with-his-base/>.

<sup>38</sup> Chris Cillizza, *A Staggering Number of Republicans Think the Media Is Exaggerating the Coronavirus*, CNN, <https://www.cnn.com/2020/03/18/politics/republican-media-trust-coronavirus/index.html> (Mar. 18, 2020, 6:30 PM).

<sup>39</sup> *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, 7:00 PM), <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*, BULL. OF ATOMIC SCIENTISTS (Sept. 30, 2020), <https://thebulletin.org/2020/09/the-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*, NATION (Aug. 3, 2020), <https://www.thenation.com/article/society/coronavirus-trump-crimes/>.

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

<sup>41</sup> Megan McGee, *Europe Needs to Push Back Against Trump*, FOREIGN POL'Y (July 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 (July 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 & WORLD



false claims about NATO allies.<sup>42</sup> He threatened to dismantle an organization that has contributed to international stability for over 70 years.<sup>43</sup> Beyond the war of words, he ordered the Pentagon to remove over 9,000 troops from Germany, one of our closest allies and a bulwark of the European Union economy.<sup>44</sup> Repeatedly, his policies seemingly pleased Russian President Vladimir Putin.<sup>45</sup> Weakening

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REP. (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, <https://www.cnn.com/2019/11/27/politics/trump-nato-contribution-nato/index.html> (Nov. 28, 2019, 3:11 AM).

<sup>42</sup> Eugene Kiely, Lori Robertson, Robert Farley & D'Angelo Gore, *FactChecking Trump's NATO Remarks*, FACTCHECK (Dec. 3, 2019), <https://www.factcheck.org/2019/12/factchecking-trumps-nato-remarks/>; Glenn Kessler, *Trump's NATO Parade of Falsehoods and Misstatements*, WASH. POST (Dec. 10, 2019), <https://www.washingtonpost.com/politics/2019/12/10/trumps-nato-parade-false-facts-misstatements/>; see also Nicholas Burns, *Trump Violates Diplomacy's Golden Rule*, 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*, INDEP. (Mar. 25, 2020, 7:32 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, <https://www.cnn.com/2019/12/05/politics/trump-nato-analysis/index.html> (Dec. 5, 2019, 5:13 AM). 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*, HILL (Aug. 24, 2019, 12:20 PM), <https://thehill.com/policy/international/458455-here-are-the-us-allies-that-have-been-in-trumps-crosshairs>.

<sup>43</sup> Charlotte McDonald-Gibson, *Trump Is Trying to Dismantle the World Order. Is NATO Next on His List?*, TIME, <https://time.com/5319626/trump-nato-summit-military-spending-germany> (June 22, 2018, 11:44 AM); Brian Klass, *America's Allies Despise Trump—And That's a Threat to NATO*, WASH. 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*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html>.

<sup>44</sup> Ashely Burrell, *Donald Trump Is Turning His Back on America's European Allies by Taking Troops out of Germany*, NAT'L INT. (Aug. 5, 2020), <https://nationalinterest.org/feature/donald-trump-turning-his-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*, N.Y. POST, <https://nypost.com/2020/06/08/trump-orders-nearly-10k-troops-removed-from-germany/> (June 8, 2020, 9:23 AM); David M. Herszenhorn, *Trump Orders Large Withdrawal of U.S. Forces from Germany*, POLITICO (June 6, 2020, 8:47 AM), <https://www.politico.com/news/2020/06/06/trump-orders-large-withdrawal-of-us-forces-from-germany-304501>.

<sup>45</sup> See CNN Wire, *Donald Trump Victory Shocks World, Pleases Putin*, WNEP, <https://www.wnep.com/article/news/local/bradford-county/donald-trump-victory-shocks-world-pleases-putin/523-81e47d0a-2662-462c-94f3-6f7ca0faed4c> (Nov. 9, 2016, 7:34 AM); Steve Chapman, *Servile Trump Keeps Doing Favors for Putin*, NAT'L MEMO (Oct. 27, 2019), <https://www.nationalmemo.com/servile-trump-keeps-doing-favors-for-putin/>; Stephen Schlesinger, *Trump's Mysterious Relationship with Putin*, PASSBLUE (Sept. 14, 2020), <https://www>.

NATO plays directly into Putin's vision of a revitalized role for Russia.<sup>46</sup>

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.<sup>47</sup> Choosing to believe Putin forced Trump to repudiate the findings of the intelligence community in the United States.<sup>48</sup> But then, members of the intelligence community and of law enforcement were, according to Trump, part of the deep state out to get him.<sup>49</sup> Trump's treatment of then-Ambassador to Ukraine

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passblue.com/2020/09/14/trumps-mysterious-relationship-with-putin/; Chris Cillizza, *Donald Trump Just Made Vladimir Putin Very Happy*, CNN, <https://www.cnn.com/2020/05/08/politics/donald-trump-vladimir-putin-russia/index.html> (May 8, 2020, 11:50 AM); Joel Gehrke, *'Useful Idiot': Alexander Vindman Dubs Trump 'an Unwitting Agent of Putin'*, WASH. EXAM'R (Sept. 14, 2020), <https://www.washingtonexaminer.com/policy/defense-national-security/useful-idiot-alexander-vindman-dubs-trump-an-unwitting-agent-of-putin>.

<sup>46</sup> Jim Edwards, *Putin Got Exactly What He Wants from NATO This Week, Thanks to Trump*, INSIDER (Dec. 4, 2019, 5:29 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), <https://www.newsweek.com/putins-gamble-end-nato-and-restoration-russian-might-368883>; Abdul Rasool Syed, *Putin's Impact on Russia & the World*, NATION (July 12, 2019), <https://nation.com.pk/12-Jul-2019/putin-s-impact-on-russia-the-world>.

<sup>47</sup> Dylan Stableford, *Trump Says He Believes Putin That Russia Didn't Interfere in Election*, YAHOO! NEWS (July 16, 2018), <https://news.yahoo.com/trump-says-believes-putin-russia-didnt-interfere-election-165339955.html>; Jordan Fabian, *Trump Refuses to Denounce Russian Involvement in Election at Joint Presser with Putin*, HILL (July 16, 2018, 12:12 PM), <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 (July 2, 2018, 5:39 PM), <https://www.nbcnews.com/politics/first-read/trump-continues-deny-russia-interfered-2016-here-s-why-s-n888206>.

<sup>48</sup> Alex Ward, *Trump Chooses Putin's Word over the US Intelligence Community's—Again*, VOX (Nov. 11, 2017, 9:31 AM), <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*, BUS. INSIDER (July 16, 2018, 9:43 AM), <https://www.businessinsider.com/trump-putin-press-conference-election-meddling-2018-7>; Matthew Nussbaum, *Trump Publicly Sides with Putin on Election Interference*, POLITICO, <https://www.politico.com/story/2018/07/16/trump-russia-putin-summit-722418> (July 16, 2018, 10:10 PM).

<sup>49</sup> See Toluse Olorunnipa, Ashley Parker & Josh Dawsey, *Trump Embarks on Expansive Search for Disloyalty as Administration-Wide Purge Escalates*, WASH. POST (Feb. 21, 2020, 5:16 PM), <https://wapo.st/37lwT72>; Ken Dilanian, *If the Deep State Hates Trump, Why Aren't More Officials Speaking out like Bolton?*, NBC NEWS (June 28, 2020, 3:00 AM), <https://www.nbcnews.com/politics/national-security/if-deep-state-hates-trump-why-aren-t-more-officials-n1232250>; Buck Sexton, *Buck Wild: 'Is President Trump Paranoid or Is the Deep State out to Get Him?'*, HILL (July 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 POL., <https://www.cnn.com/2020/02/14/politics/>

Marie Yovanovitch and National Security Council expert on Ukraine Alexander Vindman stunned even some Trump supporters who had said little to oppose him prior to their testimony leading up to Trump's impeachment.<sup>50</sup> His firing or dismissal of many public officials for adherence to the law, instead of showing fawning loyalty to him, threatened the rule of law.<sup>51</sup>

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 U.S. history.<sup>52</sup> He 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.<sup>53</sup> Not only does the commutation seem

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andrew-mccabe-donald-trump-department-of-justice/index.html (Feb. 14, 2020, 4:27 PM); *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](https://www.democracynow.org/2020/8/24/qanon_trump).

<sup>50</sup> Victoria Bekiempis, *Republicans Condemned for Smearing Impeachment Witnesses Born Abroad*, GUARDIAN (Nov. 18, 2019, 2:00), <https://www.theguardian.com/us-news/2019/nov/17/trump-impeachment-inquiry-witnesses-vindman-yovanovitch>; Morgan Chalfant & Brett Samuels, *Trump Attacks on Vindam Trigger Backlash*, HILL (Oct. 29, 2019) <https://thehill.com/homenews/administration/467994-trump-attacks-on-vindman-trigger-backlash>.

<sup>51</sup> JEFFREY TOOBIN, TRUE CRIMES AND MISDEMEANORS: THE INVESTIGATION OF DONALD TRUMP 39–40, 59–61 (2020).

<sup>52</sup> Grace Panetta, *Every Trump Campaign and Administration Official Who Has Been Indicted on Federal Criminal Charges*, INSIDER (July 20, 2021), <https://www.businessinsider.com/all-the-trump-campaign-admin-officials-to-face-federal-charges-2021-7>; *Factbox: Here Are Eight Trump Associates Arrested or Convicted of Crimes*, REUTERS, <https://www.reuters.com/article/us-usa-trump-bannon-associates-factbox/factbox-here-are-eight-trump-associates-arrested-or-convicted-of-crimes-idUSKBN25G1YU> (Aug. 20, 2020); Kurt Bardella, Opinion, *Trump Didn't Drain the Swamp. Now Biden May Drown Him in It*, USA TODAY (May 21, 2020, 3:15 AM), <https://www.usatoday.com/story/opinion/2020/05/21/trump-didnt-drain-swamp-biden-drown-him-column/5228137002/>; Heather Digby Parton, Commentary, *Republicans Will Claim Trump Was Going After Corruption: You Just Have to Laugh*, SALON (Nov. 13, 2019, 8:30 AM), <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 (Jan. 17, 2017), <https://time.com/donald-trump-drain-swamp/>; Adam Andrzejewski, *A Progress Report—Is President Donald Trump "Draining the Swamp?"*, FORBES (Aug. 28, 2019, 11:33 AM), <https://www.forbes.com/sites/adamandrzejewski/2019/08/28/a-progress-report-is-president-donald-trump-draining-the-swamp/>; David Atkins, *Trump Is the Most Crooked President in American History. That Should Matter.*, WASH. MONTHLY (Oct. 11, 2020), <https://washingtonmonthly.com/2020/10/11/trump-is-the-most-crooked-president-in-american-history-that-should-matter/>.

<sup>53</sup> Mary Papenfuss, *'Most Corrupt President in History': Critics Reel After Trump Lets Roger Stone Stay Free*, HUFFPOST (July 11, 2020, 12:40 AM), [https://www.huffpost.com/entry/roger-stone-donald-trump-reaction\\_n\\_5f092ec2c5b67a80bc07a657](https://www.huffpost.com/entry/roger-stone-donald-trump-reaction_n_5f092ec2c5b67a80bc07a657).

like cronyism, but it may well have been an obstruction of justice.<sup>54</sup>

On the subject of obstruction of justice, Trump outmaneuvered Special Counsel Robert Mueller, again by adopting means almost unheard of in the past.<sup>55</sup> Trump pressured individuals around him to refuse to cooperate with Mueller's team.<sup>56</sup> Despite Supreme Court precedent that seemingly supported Mueller's right to subpoena the President,<sup>57</sup> 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.<sup>58</sup> Later, Trump hired William Barr as Attorney General, largely because Barr sent him a memo supporting Trump's extreme view of presidential power.<sup>59</sup> Barr would later publish a highly misleading summary of the Mueller Report that allowed Trump to claim exoneration of criminal wrongdoing.<sup>60</sup> Anyone able to wade through the report, filled with

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<sup>54</sup> *Id.*; Sam Berger, *Pardoning Roger Stone Could Itself Be an Unpardonable Crime*, JUST SEC. (July 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 (July 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*, N.Y. TIMES (July 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 (July 11, 2020), <https://www.newyorker.com/news/daily-comment/the-roger-stone-case-shows-why-trump-is-worse-than-nixon>.

<sup>55</sup> JEFFREY TOOBIN, TRUE CRIMES AND MISDEMEANORS: THE INVESTIGATION OF DONALD TRUMP 90–91, 197–98, 271–76 (2020).

<sup>56</sup> Mark Mazzetti, Maggie Haberman, Nicholas Fandos & Michael S. Schmidt, *Intimidation, Pressure and Humiliation: Inside Trump's Two-Year War on the Investigations Encircling Him*, N.Y. 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 POL., <https://www.cnn.com/2019/04/17/politics/trump-mueller-fallout/index.html> (Apr. 17, 2019, 10:24 PM).

<sup>57</sup> *See* United States v. Nixon, 418 U.S. 683 (1974); *see also* Clinton v. Jones, 520 U.S. 681 (1997).

<sup>58</sup> *See* 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>.

<sup>59</sup> David Rohde, *William Barr, Trump's Sword and Shield: The Attorney General's Mission to Maximize Executive Power and Protect the Presidency*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/william-barr-trumps-sword-and-shield>; *see also* Manuel Roig-Franzia & Tom Hamburger, *Bill Barr, Unbound*, WASH. POST (Sept. 15, 2020), <https://www.washingtonpost.com/magazine/2020/09/15/william-barr-president-trump-perfect-match>.

<sup>60</sup> David A. Graham, *Barr Mised the Public—And It Worked*, ATLANTIC (May 1, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/barr-mised-the-public-and-it-worked/588463/>; *see also* Salvador Rizzo, *What Attorney General Barr Said vs. What the Mueller Report*

redactions, should recognize that Mueller admitted being unable to get evidence about Trump's knowledge about the meetings.<sup>61</sup> 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.<sup>62</sup>

Trump's misconduct that led to the Mueller Report and later to his impeachment were hardly his only violations of the law. Prior to Trump's presidency, most Americans had never heard of the Emoluments Clause of the Constitution.<sup>63</sup> And yet, during his presidency, Trump made millions of dollars, almost certainly in violation of that clause.<sup>64</sup> After years of fighting to keep his tax returns hidden from public view, Trump continues to lose that battle.<sup>65</sup> Some commentators suspect

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*Said*, WASH. POST (Apr. 19, 2019, 11:00 PM), <https://www.washingtonpost.com/politics/2019/04/19/what-attorney-general-barr-said-vs-what-mueller-report-said/>.

<sup>61</sup> Jeffrey Toobin, *Why the Mueller Investigation Failed*, NEW YORKER (June 29, 2020), <https://www.newyorker.com/magazine/2020/07/06/why-the-mueller-investigation-failed> ("Mueller's verdict was more nuanced. The report goes on to say that, 'while the investigation identified numerous links between individuals with ties to the Russian government and individuals associated with the Trump Campaign, the evidence was not sufficient to support criminal charges.' Certainly, Mueller found abundant evidence that Trump and his campaign had wanted to collude and conspire with Russia, but hadn't been able to prove that they had done so. The report's verdict pointed more to insufficient evidence than to innocence."); *see also* *Mueller Finds No Collusion with Russia, Leaves Obstruction Question Open*, ABA NEWS (Mar. 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/03/mueller-concludes-investigation/>; Mark Mazzetti & Katie Benner, *Mueller Finds No Trump-Russia Conspiracy, but Stops Short of Exonerating President on Obstruction*, N.Y. 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*, WASH. 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](https://www.washingtonpost.com/politics/mueller-report-russia-investigation-findings/2019/04/18/b07f4310-56f9-11e9-814f-e2f46684196e_story.html).

<sup>62</sup> Timothy L. O'Brien, *Opinion, Does Mueller Think Trump's Guilty? Read Closely*, BLOOMBERG (Apr. 19, 2019, 3:00 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, <https://www.vox.com/2019/4/18/18484731/mueller-report-trump-barr-obstruction-legal-experts> (Apr. 20, 2019, 9:20 AM).

<sup>63</sup> U.S. CONST. art. I, § 9, cl. 8.

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

<sup>65</sup> Charlie Savage, *Judge Rules that Congress Can See Trump's Tax Returns*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/2021/12/14/us/trump-tax-returns.html>; *see also* Daniel Hemel, *Trump Lost at the Supreme Court, but We Still Won't See His Taxes by November*, WASH. POST (July 10, 2020, 9:48 AM), [https://www.washingtonpost.com/outlook/trump-taxes-delay-election/2020/07/10/3e9ae314-c2a8-11ea-b178-bb7b05b94af1\\_story.html](https://www.washingtonpost.com/outlook/trump-taxes-delay-election/2020/07/10/3e9ae314-c2a8-11ea-b178-bb7b05b94af1_story.html). The New York Times

questionable deductions that may amount to tax fraud.<sup>66</sup>

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

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obtained Trump's tax returns through separate means. See Russ Buettner, Susanne Craig & Mike McIntire, *Trump's Taxes Show Chronic Losses and Years of Income Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), <https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html>.

<sup>66</sup> Buettner et al., *supra* note 65.; Joyce M. Rosenberg, *Trump Business Deductions: Sketchy, Normal or In-Between?*, AP NEWS (Oct. 1, 2020), <https://apnews.com/article/donald-trump-archive-c641731906789c1e272c684a910e98e>; Elie Mystal, *Trump Is Either a Tax Fraud or the World's Worst Businessman*, WASH. POST (Sept. 28, 2020, 6:43 AM), <https://www.washingtonpost.com/outlook/2020/09/28/trump-taxes-fraud-business-failure/>.

<sup>67</sup> Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES, <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html> (Feb. 19, 2021); 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 (June 1, 2017, 3:40 PM), <https://www.vox.com/energy-and-environment/2017/6/1/15725510/trump-pulls-us-out-of-paris-climate-deal>.

<sup>68</sup> Andrew Glass, *Trump Scuttles Trans-Pacific Trade Pact*, POLITICO (Jan. 23, 2019, 12:20 AM), <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*, N.Y. 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*, WASH. 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/>.

<sup>69</sup> Sebastian Rotella, James Bandler & Patricia Callahan, *Inside the Trump Administration's Decision to Leave the World Health Organization*, PROPUBLICA (June 20, 2020, 5:00 AM), <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 (July 7, 2020), <https://www.bbc.com/news/world-us-canada-53327906>.

<sup>70</sup> Carlos Tejada & Amie Tsang, *How Trump's Trade War Is Being Fought Around the World*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/business/trade-war-trump.html> (noting that Trump “juggl[ed] multiple trade conflicts” and that his demands “caught trading partners off guard”); see also Heather Long, *Trump Has Officially Put More Tariffs on U.S. Allies than on China*, WASH. POST (May 31, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/05/31/trump-has-officially-put-more-tariffs-on-u-s-allies-than-on-china/>.

<sup>71</sup> Alexandra Schmitt, *President Trump's Alarming Human Rights Agenda at Home and Abroad*, CTR. FOR AM. PROGRESS (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), <https://time.com/5645501/trump-anti-immigration-rhetoric-racism/>; Paul A. Kramer, Opinion, *Trump's Anti-Immigrant Racism Represents an American Tradition*, N.Y. 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.<sup>72</sup> President Obama calmed Americans after the massacre at Sandy Hook Elementary School.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> Why not? Apparently because John Lewis protested Trump's election and refused to attend his inauguration.<sup>76</sup> But then, he had bad things to say about Senator John McCain, both before and after his death.<sup>77</sup> By stark contrast, during the first presidential debate with Joe Biden, Trump was unwilling to condemn white nationalists.<sup>78</sup>

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

<sup>73</sup> Megan Slack, *President Obama Speaks on the Shooting in Connecticut*, WHITE HOUSE ARCHIVES (Dec. 14, 2012, 3:34 PM), <https://obamawhitehouse.archives.gov/blog/2012/12/14/president-obama-speaks-shooting-connecticut>; see also *Just like Anyone Else's Kids*, HIST., <https://www.history.com/the-obama-years/newtown.html> (last visited June 2, 2022).

<sup>74</sup> Rick Klein, *Trump Said 'Blame on Both Sides' in Charlottesville, Now the Anniversary Puts Him on the Spot*, ABC NEWS (Aug. 12, 2018, 7:57 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'*, 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/>.

<sup>75</sup> 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), <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*, WASH. POST (Aug. 4, 2020), <https://www.washingtonpost.com/nation/2020/08/04/trump-john-lewis-axios-swan/>.

<sup>76</sup> See sources cited *supra* note 75.

<sup>77</sup> Christal Hayes, *President Donald Trump on the Late Sen. John McCain: 'He Did the Nation a Tremendous Disservice'*, USA TODAY (Apr. 25, 2019, 11:45 PM), <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*, ATLANTIC (Aug. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/08/trumps-reaction-to-mccain-as-microcosm/568696/>; John Cassidy, *Donald Trump's Response to John McCain's Death Reminds Us Just How Petty He Is*, 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>.

<sup>78</sup> Sarah McCammon, *From Debate Stage, Trump Declines to Denounce White Supremacy*, NPR (Sept. 30, 2020, 12:37 AM), <https://www.npr.org/2020/09/30/918483794/from-debate->

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.<sup>79</sup> He attempted to distinguish between mail-in ballots (according to him, subject to "widespread fraud") and absentee ballots, despite any meaningful difference between the two methods of voting.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> During his first debate with Joe Biden, Trump refused to agree that he would step down if he lost the election.<sup>83</sup>

About three months before the election, Trump floated the idea of postponing the election because of the pandemic.<sup>84</sup> That idea so violated legal and political

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stage-trump-declines-to-denounce-white-supremacy; see also Megan Vasquez & Paul LeBlanc, *Trump Refuses to Condemn White Supremacists at Presidential Debate*, CNN POL., <https://www.cnn.com/2020/09/30/politics/proud-boys-trump-white-supremacists-debate/index.html> (Sept. 30, 2020, 9:22 AM).

<sup>79</sup> See Miles Parks, *Ignoring FBI and Fellow Republicans, Trump Continues Assault on Mail-In Voting*, NPR (Aug. 28, 2020, 12:46 PM), <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, <https://www.usatoday.com/story/news/politics/elections/2020/09/30/2020-debate-trump-makes-outrageous-claims-mail-voting/3586836001/> (Oct. 1, 2020, 12:26 PM).

<sup>80</sup> Parks, *supra* note 79; accord Garrison, *supra* note 79.

<sup>81</sup> Joe Sutton, *Trump Campaign Sues Nevada over Plan to Mail Ballots to All Registered Voters*, CNN, <https://www.cnn.com/2020/08/05/politics/trump-campaign-nevada-mail-in-ballots/index.html> (Aug. 5, 2020, 12:49 PM); 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*, BUS. INSIDER (Sept. 27, 2020, 12:50 PM), <https://www.businessinsider.com/trump-is-involved-in-litigation-about-voting-2020-9>.

<sup>82</sup> Sam Levine, *Trump Admits He Is Undermining USPS to Make It Harder to Vote by Mail*, GUARDIAN (Aug. 13, 2020, 12:25), <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>.

<sup>83</sup> Sahil Kapur, *Trump Has Signaled He Won't Accept an Election Loss. Many of His Voters Agree.*, NBC NEWS, <https://www.nbcnews.com/politics/2020-election/trump-has-signaled-he-won-t-accept-election-loss-many-n1245304> (Oct. 30, 2020, 8:11 AM); see also Kevin Breuninger, *Trump Won't Commit to Peaceful Transfer of Power if He Loses the Election*, CNBC, <https://www.cnbc.com/2020/09/23/trump-wont-commit-to-peaceful-transfer-of-power-if-he-loses-the-election.html> (Sept. 24, 2020, 10:40 AM).

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



norms that Professor Steven Calabresi, co-founder of the Federalist Society, published an op-ed stating the Trump's conduct was impeachable.<sup>85</sup>

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.<sup>86</sup> At least according to news reports, her sin was taking an aggressive stance to prevent the spread of COVID-19.<sup>87</sup> Reportedly, at a campaign rally, Trump's supporters chanted, "Lock her up" in reference to Governor Whitmer, leading Trump to laugh and comment, "Lock them all up."<sup>88</sup> His behavior left some Republicans looking to distance themselves from his divisiveness.<sup>89</sup>

One can find far more examples of Trump's recklessness. For example, think of January 6, 2021, and his role in inspiring the violent raid on the Capitol. These are only some of the ways in which Trump ignored or openly violated political norms. Not surprisingly, perhaps, his 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.<sup>90</sup> His Republican critics shared one similarity: they announced their opposition to Trump's

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

<sup>86</sup> Nicholas Bogel-Burroughs, Shaila Dewan & Kathleen Gray, *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, N.Y. TIMES, <https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html> (Apr. 13, 2021).

<sup>87</sup> See Ed White, *Man in Gov. Whitmer Kidnap Plot: No One Twisted Our Arms*, AP NEWS (Mar. 24, 2022), <https://apnews.com/article/whitmer-kidnap-plot-trial-biden-covid-health-michigan-aff035ce3331139a029b052a77279962> (reporting that one of the alleged plot leaders "believed Whitmer's COVID-19 restrictions were 'tyrannical'"); Bogel-Burroughs et al., *supra* note 86.

<sup>88</sup> Amanda Marcotte, *Trump Is Falling Way Behind with Female Voters. His Response? 'Lock Her Up!'*, SALON (Oct. 19, 2020, 1:26 PM), <https://www.salon.com/2020/10/19/trump-is-falling-way-behind-with-female-voters-his-response-lock-her-up/>.

<sup>89</sup> See Jonathan Martin, *'Lock Them All Up': Trump's Whitmer Attack Fits a Damaging Pattern*, N.Y. TIMES (Oct. 18, 2020), <https://www.nytimes.com/2020/10/18/us/politics/trump-whitmer-michigan.html>. However, more recently, many Republican office holders and potential candidates have rallied around a Trump campaign for 2024. See Melanie Zanona & Manu Raju, *Republicans Rally Around Possible Trump 2024 Bid as They Downplay His Role on January 6*, CNN, <https://www.cnn.com/2021/10/13/politics/congressional-republicans-trump-president-2024> (Oct. 13, 2021, 8:12 PM).

<sup>90</sup> See Knutson & Ayesh, *supra* note 2.

reelection.<sup>91</sup> Some, notably John Bolton, found that Trump was “erratic and impulsive” and “unfit for office.”<sup>92</sup>

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.<sup>93</sup> Others disagreed and have argued that Trump was a manifestation of a long trend in the Republican Party.<sup>94</sup> Each position has some truth behind it.

A group of conservatives who served under President George W. Bush formed “43 Alumni for Joe Biden.”<sup>95</sup> It included at least 230 conservatives, primarily Republicans, who worked on Bush’s 2000 and 2004 campaigns.<sup>96</sup> The group’s website indicated that they did not oppose the Republican Party.<sup>97</sup> Instead, they saw Trump as the problem. “Republican Voters Against Trump” was a similar group, again dedicated to electing Biden, with a hope to revitalize the Republican Party after Trump’s departure.<sup>98</sup>

Yet another group formed to oppose Trump was the Lincoln Project.<sup>99</sup> It included prominent Republicans, including George T. Conway III, Kellyanne Conway’s husband.<sup>100</sup> Kellyanne Conway, of course, was a counselor to Trump.<sup>101</sup> George Conway and his colleagues described the Lincoln Project as “an effort to

<sup>91</sup> *Id.*

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

<sup>93</sup> See Knutson & Ayesh, *supra* note 2 (describing the reasons some prominent Republicans decided not to vote for Trump, including his failure to adhere to the Constitution).

<sup>94</sup> See, e.g., STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* 87, 201 (2020).

<sup>95</sup> Tim Reid, *Exclusive: Hundreds of George W. Bush Administration Officials to Back Biden, Group Says*, REUTERS, <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> (July 1, 2020, 2:11 AM).

<sup>96</sup> *Id.*; *43 Alumni Who Endorsed Joe Biden*, 43 ALUMNI FOR AM., <https://43alumniforamerica.com/43-alumni-endorsing-joe-biden/> (last visited June 2, 2022) (listing 347 alumni who “publicly indicated their support by voting for Joe Biden”).

<sup>97</sup> 43 ALUMNI FOR AM., <https://43alumniforamerica.com/> (last visited June 2, 2022).

<sup>98</sup> REPUBLICAN VOTERS AGAINST TRUMP, <https://rvat.org/> (last visited June 2, 2022).

<sup>99</sup> LINCOLN PROJECT, <https://lincolnproject.us/> (last visited June 2, 2022).

<sup>100</sup> John Haltiwanger, *Kellyanne Conway’s Husband and Other Republicans Launch Project Dedicated to Defeating Trump in 2020*, BUS. INSIDER INDIA (Dec. 17, 2019, 8:47 PM), <https://www.businessinsider.in/politics/news/kellyanne-conways-husband-and-other-republicans-launch-project-dedicated-to-defeating-trump-in-2020/articleshow/72854655.cms>.

<sup>101</sup> *Id.*

highlight our country's story and values, and its people's sacrifices and obligations."<sup>102</sup> The Lincoln Project also critiqued other Republicans for allowing, embracing, and defending the President and his actions.<sup>103</sup> 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.<sup>104</sup>

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.<sup>105</sup> Like members of the Lincoln Project and other similar organizations, Brooks's focus was on ways in which Trump abandoned core values of the Republican Party.<sup>106</sup> He emphasized Trump's "bigotry, incompetence and tax cuts for the wealthy."<sup>107</sup> He indicated special ire towards Trump and his family, whom he identified as manipulative, selfish, petty, and untrustworthy.<sup>108</sup> Brooks saw Trump as "impulse-driven, ignorant, narcissistic and intellectually dishonest."<sup>109</sup>

George Will, yet another public intellectual, also announced his opposition to Trump.<sup>110</sup> 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.<sup>111</sup> His Washington Post op-ed's headline said it all: "Trump Must be Removed. So Must His Congressional Enablers."<sup>112</sup> As was the case with Brooks, Will's primary focus was on Trump, whom he called the "Crybaby-in-Chief."<sup>113</sup>

<sup>102</sup> George Conway III, Steve Schmidt, John Weaver & Rick Wilson, *We Are Republicans and We Want Trump Defeated*, N.Y. TIMES (Dec. 17, 2019), <https://www.nytimes.com/2019/12/17/opinion/lincoln-project.html>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See, e.g., David Brooks, N.Y. TIMES, <https://www.nytimes.com/column/david-brooks> (last visited June 2, 2022); sources cited *infra* notes 106–109.

<sup>106</sup> See, e.g., David Brooks, Opinion, *Where Do Republicans Go from Here?*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/opinion/sunday/republican-party-trump-2020.html>.

<sup>107</sup> *Id.*

<sup>108</sup> See David Brooks, Opinion, *Trump and the Politics of 'Mean World'*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/27/opinion/trump-republicans-2020.html>.

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

<sup>110</sup> See, e.g., George Will, Opinion, *Trump Must Be Removed. So Must His Congressional Enablers.*, WASH. POST (June 1, 2020), [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](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).

<sup>111</sup> *See id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

Former Republican, now independent Max Boot was yet another Trump critic.<sup>114</sup> Boot, who considers himself a Reagan conservative,<sup>115</sup> had a successful career as a foreign policy advisor for Republicans such as John McCain, Mitt Romney, and Marco Rubio.<sup>116</sup> Boot described Trump as “a liar, an ignoramus and a moral abomination.”<sup>117</sup> Boot abandoned the Republican Party when Trump won the Republican nomination in the 2016 election.<sup>118</sup> Boot argued that the Republican Party that he had once known and loved had failed him by endorsing Trump’s personality and policy positions.<sup>119</sup>

Boot also argued that Trump was concerned only with his own interests and used the federal government to serve those interests.<sup>120</sup> He identified Trump’s failure in handling the coronavirus crisis as more proof of Trump’s failure as a leader.<sup>121</sup> In Boot’s words, “Trump has established himself as the worst president in U.S. history.”<sup>122</sup>

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.”<sup>123</sup> Boot concluded that Trump “has disgraced the nation’s highest office as no previous occupant has come close to doing.”<sup>124</sup>

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

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<sup>114</sup> 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/>.

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

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

<sup>117</sup> Linker, *supra* note 115.

<sup>118</sup> See Beauchamp, *supra* note 116 (reporting that Boot, who was working for Marco Rubio at the time, indicated he “would be willing to pull the level for Hillary Clinton” if Trump won the Republican nomination).

<sup>119</sup> Linker, *supra* note 115; see also Max Boot, Opinion, *The Worst President. Ever.*, WASH. POST (Apr. 5, 2020), <https://www.washingtonpost.com/opinions/2020/04/05/worst-president-ever/>.

<sup>120</sup> Linker, *supra* note 115; see also Beauchamp, *supra* note 116; Boot, *supra* note 119.

<sup>121</sup> Boot, *supra* note 119.

<sup>122</sup> *Id.*

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

<sup>124</sup> *Id.*

and members of the government enabled Trump to abandon the Party's core principles.<sup>125</sup>

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.<sup>126</sup> That critique focuses on many policy positions dating back to the 1960s and beyond that signaled the Party's change of direction.<sup>127</sup> 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.<sup>128</sup>

Think about the scorn with which Lindsay Graham and Ted Cruz treated Trump as a candidate.<sup>129</sup> Despite that, they have signed onto many of his initiatives.<sup>130</sup> Mitch McConnell, the 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.<sup>131</sup>

Trump has flaunted some Republican priorities. His tariff wars have troubled many traditional free-trade Republicans, for example.<sup>132</sup> His crass behavior has

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

<sup>126</sup> Sean Illing, "The Central Weakness of Our Political System Right Now Is the Republican Party", VOX (Jan. 13, 2021, 12:40 PM), <https://www.vox.com/policy-and-politics/22151075/trump-republican-party-american-democracy-daniel-ziblatt>; 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/>.

<sup>127</sup> Rothenberg, *supra* note 126.

<sup>128</sup> *Id.*

<sup>129</sup> See, e.g., Seung Min Kim & Connor O'Brien, *Graham: Choice Between Trump, Cruz like 'Being Shot or Poisoned'*, POLITICO (Jan. 21, 2016, 2:27 PM), <https://www.politico.com/story/2016/01/lindsey-graham-trump-cruz-choice-218069>; see also Ben Jacobs, *Cruz Attacks 'Serial Philanderer' Trump as Republican Race Enters 'The Abyss'*, GUARDIAN (May 3, 2016, 14:49), <https://www.theguardian.com/us-news/2016/may/03/donald-trump-ted-cruz-jfk-assassination-indiana-primary-philanderer>.

<sup>130</sup> See, e.g., Ed Kilgore, *Lindsay Graham's Latest Mission: Encouraging Trump's Blood Lust*, N.Y. INTELLIGENCER (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>.

<sup>131</sup> Carl Hulse, *The Relationship Between McConnell and Trump Was Good for Both — Until It Wasn't*, N.Y. TIMES, <https://www.nytimes.com/2021/02/19/us/trump-mcconnell-republicans.html> (Apr. 30, 2021).

<sup>132</sup> Sean Sullivan & Jenna Johnson, *Donald Trump Starts a Trade War—with the Republican Party*, WASH. POST (July 30, 2016), <https://wapo.st/3wth1b5>; see also Burgess Everett & Marianne Levine, *Trump Conquers Republicans on Trade*, POLITICO (Dec. 2, 2019, 7:39 PM), <https://www.politico.com/news/2019/12/02/trump-conquers-republicans-on-trade-074857>.

bothered some supporters.<sup>133</sup> At its core, though, much of the Trump agenda follows the recent Republican Party's move to the far right.<sup>134</sup> 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.<sup>135</sup> The GOP, after all, is (was) the party of Abraham Lincoln.<sup>136</sup> 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.<sup>137</sup> 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 Trump for not disavowing white supremacy during the debate.<sup>138</sup> Some others joined Scott and McConnell.<sup>139</sup>

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-time strategy to appeal to aggrieved whites, including white supremacists.<sup>140</sup>

Longtime political consultant Stuart Stevens recently published a book explaining his disaffection with the Republican Party.<sup>141</sup> He traced the beginning of what

<sup>133</sup> 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>.

<sup>134</sup> Illing, *supra* note 126.

<sup>135</sup> Ed Mazza, *Mary Trump Has Terrifying Explanation for Trump's White Supremacist Comments*, HUFFPOST (Oct. 1, 2020, 5:25 AM), [https://www.huffpost.com/entry/mary-trump-white-supremacists\\_n\\_5f7570e1c5b6d698bb282a99](https://www.huffpost.com/entry/mary-trump-white-supremacists_n_5f7570e1c5b6d698bb282a99).

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

<sup>137</sup> *Trump Refuses to Denounce White Supremacy in Chaotic Debate*, N.Y. TIMES, <https://www.nytimes.com/live/2020/09/29/us/presidential-debate-trump-biden> (Jan. 20, 2021); Kevin Breuninger, *Trump Should Correct His Statements on White Supremacists*, GOP Sen. Tim Scott Says, CNBC, <https://www.cnn.com/2020/09/30/trump-should-correct-statements-on-white-supremacists-gop-sen-tim-scott-says.html> (Sept. 30, 2020, 3:02 PM).

<sup>138</sup> Alexander Burns, Jonathan Martin & Maggie Haberman, *G.O.P. Alarmed by Trump's Comments on Extremist Group, Fearing a Drag on the Party*, N.Y. TIMES, <https://www.nytimes.com/2020/09/30/us/politics/trump-debate-white-supremacy.html> (Jan. 20, 2021).

<sup>139</sup> Nicholas Wu, *Republicans in Congress Say Trump Should Have Directly Condemned White Supremacists at Presidential Debate*, USA TODAY, <https://www.usatoday.com/story/news/politics/elections/2020/09/30/gop-senators-trump-should-have-directly-condemned-white-supremacists/3571277001/> (Sept. 30, 2020, 2:59 PM).

<sup>140</sup> Simon Clark, *How White Supremacy Returned to Mainstream Politics*, CTR. FOR AM. PROGRESS (July 1, 2020), <https://www.americanprogress.org/issues/security/reports/2020/07/01/482414/white-supremacy-returned-mainstream-politics/>.

<sup>141</sup> See generally STEVENS, *supra* note 94. See *Longtime GOP Strategist Says He'll 'Work with Democrats' to Defeat Trump*, PBS (Aug. 5, 2020, 6:40 PM), <https://www.pbs.org/newshour/show/>

would later be described as the Southern Strategy back to a speech by Barry Goldwater in 1961.<sup>142</sup> Goldwater argued, “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.”<sup>143</sup> As Goldwater predicted, African Americans abandoned the Republican Party in 1964 and have never returned.<sup>144</sup>

Richard Nixon’s appeal to the white working class during the 1968 presidential campaign is well documented.<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup>

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

longtime-gop-strategist-says-hell-work-with-democrats-to-defeat-trump.

<sup>142</sup> STEVENS, *supra* note 94, at 13.

<sup>143</sup> *Id.* (quoting Walter De Vries & Jack Bass, *Cross-Pressures in the White South*, in EMERGING COALITIONS IN AMERICAN POLITICS 307, 309 (Seymour Martin Lipset ed., 1978)).

<sup>144</sup> *Id.*

<sup>145</sup> See, e.g., Daniel Strauss, ‘The Politics of Racial Division’: Trump Borrows Nixon’s ‘Southern Strategy’, GUARDIAN (Sept. 5, 2020, 4:30 AM), <https://www.theguardian.com/us-news/2020/sep/05/donald-trump-richard-nixon-southern-strategy>; Aabid Allibhai, *Law and Order Beats Bread and Butter: Politics and the White Working-Class*, ONLABOR (Apr. 26, 2016), <https://onlabor.org/law-and-order-beats-bread-and-butter-politics-and-white-working-class/>; Terence McArdle, *The ‘Law and Order’ Campaign That Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5, 2018), <https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/>.

<sup>146</sup> See McArdle, *supra* note 145.

<sup>147</sup> *Id.*

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

<sup>149</sup> See generally Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273 (2010) (elucidating the connection between contemporary policies on crime and the Southern Strategy advanced by Nixon, Reagan, and Bush); Leland Ware & David C. Wilson, *Jim Crow on the “Down Low”: Subtle Racial Appeals in Presidential Campaigns*, 24 J. C.R. & ECON. DEV. 299 (2009) (examining “the role of subtle racial appeals” in the Nixon, Reagan, and Bush presidential campaigns).

<sup>150</sup> See Jaime Fuller, *What the Neshoba County Fair Says About Southern Politics*, WASH. POST (July 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*, WASH. POST (June 19, 2020, 1:31 PM), <https://www.washingtonpost.com/nation/2020/06/19/ronald-reagan-philadelphia-miss-donald-trump-tulsa-pattern-racially-divisive-politics/>.

remember, Neshoba County was where Klansmen killed three civil rights workers in 1964.<sup>151</sup>

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 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?<sup>152</sup>

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

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 shift to the right in their party.<sup>154</sup>

<sup>151</sup> See *Murder in Mississippi*, PBS (June 2014), <https://www.pbs.org/wgbh/americanexperience/features/freedomsummer-murder/>.

<sup>152</sup> Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 803–04 (2019) (footnotes omitted).

<sup>153</sup> *Id.* at 804. To 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. See *id.*

<sup>154</sup> Maeve Reston, *Aggressive Civil-Rights Stance Left Romney's Father at Odds with Party*, SEATTLE TIMES, <https://www.seattletimes.com/nation-world/aggressive-civil-rights-stance-left-romneys-father-at-odds-with-party/> (July 11, 2012, 6:06 AM) (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 MAG. (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*, INDEP., (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 Dies at 89; 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



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

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

In context, Trump's racism is overt.<sup>164</sup> But it is not aberrational. Many in the

former Senator Hatfield's career as a moderate Republican); *Edward Brooke, First Black Elected Senator, Dies at 95*, POLITICO, <https://www.politico.com/story/2015/01/edward-brooke-obituary-113946> (Jan. 3, 2015, 10:07 PM) (explaining how, despite being a Republican, Brooke earned his reputation as a Senate liberal).

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

<sup>156</sup> 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 governors of Maryland, Massachusetts, and Vermont, respectively).

<sup>157</sup> See Parker Richards, *The Last Liberal Republicans Hang On*, 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 "oddballs in the Republican Party of Donald Trump").

<sup>158</sup> 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>.

<sup>159</sup> 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/>.

<sup>160</sup> See *id.*

<sup>161</sup> STEVENS, *supra* note 94, at 19.

<sup>162</sup> *Id.* at 18–19.

<sup>163</sup> *Id.* at 19.

<sup>164</sup> See, e.g., German Lopez, *Donald Trump's Long History of Racism, from the 1970s to 2020*, VOX, <https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history> (Aug. 13, 2020, 7:00 PM); Ishaan Tharoor, *Trump's Racism Cements His Party's Place Among the West's Far Right*, WASH. POST (July 16, 2019), <https://www.washingtonpost.com/world/2019/07/16/trumps-racism-cements-his-partys-place-among-vests-far-right/>.

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.<sup>165</sup>

Other Trump policy provisions also reflect mainstream Republican priorities. Justice Ginsburg's death brought front and center the Republicans' shameless indifference to political norms.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> As developed below, Trump's record on judicial appointments dovetails with the right wing's long-term strategy.<sup>169</sup> 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.<sup>170</sup>

Because of McConnell's success in preventing Obama from appointing Justice Scalia's successor and in ramming through the confirmation of Amy Coney Barrett,<sup>171</sup> Trump may succeed in fulfilling a promise that Republican presidents dating back to Ronald Reagan have not been able to achieve: overruling *Roe v. Wade*.<sup>172</sup> Two of Reagan's appointees to the Court, Sandra Day O'Connor and Anthony Kennedy, helped narrow *Roe*, but kept it in place.<sup>173</sup> Similarly, the first President

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<sup>165</sup> See Clark, *supra* note 140.

<sup>166</sup> See Peter Baker, *In Swearing in Barrett, Trump Defiantly Mimics 'Superspreeder' Rose Garden Ceremony*, N.Y. TIMES (Oct. 26, 2020), <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).

<sup>167</sup> 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/>.

<sup>168</sup> See *id.*

<sup>169</sup> *Infra* Part III.

<sup>170</sup> See Priyanka Boghani, *How McConnell's Bid to Reshape the Federal Judiciary Extends Beyond the Supreme Court*, FRONTLINE, <https://www.pbs.org/wgbh/frontline/article/how-mcconnell-and-the-senate-helped-trump-set-records-in-appointing-judges/> (Oct. 16, 2020).

<sup>171</sup> *Id.*; see also Carl Hulse, *How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation*, N.Y. TIMES, <https://www.nytimes.com/2020/10/27/us/mcconnell-barrett-confirmation.html> (Nov. 3, 2020).

<sup>172</sup> 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*).

<sup>173</sup> See Robert Barnes, *The Last Time the Supreme Court Was Invited to Overturn Roe v. Wade, a Surprising Majority Was Unwilling*, WASH. POST (May 29, 2019), <https://wapo.st/3vjhPPg>

Bush's appointee David Souter joined O'Connor and Kennedy in upholding *Roe*.<sup>174</sup> Even Chief Justice John Roberts shied away from overruling recent precedent that would have further impaired *Roe* during the 2019 term of the Court.<sup>175</sup> With Justice Ginsburg's death and the appointment of Justice Barrett, even Chief Justice Roberts's concern about adherence to precedent may not matter.<sup>176</sup>

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.<sup>177</sup> Despite that, Democrats have a much better track record than do Republicans with respect to the economy.<sup>178</sup> That track record is long-standing, whether measured by economic growth or the size of the deficit.<sup>179</sup> Dating back to Reagan's presidency, Republicans have claimed that tax cuts are the remedy for almost any problem faced in the United States.<sup>180</sup>

The sharp increase in income inequity began with Reagan's restricting of tax rates.<sup>181</sup> Despite inheriting a surplus, George W. Bush, who lost the popular vote in

(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*).

<sup>174</sup> See *id.*

<sup>175</sup> *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133–42 (2020) (Roberts, C.J., concurring).

<sup>176</sup> 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 *Sebelius*. See, e.g., *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's vote.

<sup>177</sup> See *Views of the Parties, Congress*, PEW RSCH. CTR. (June 20, 2018), <https://www.pewresearch.org/politics/2018/06/20/3-views-of-the-parties-congress/>.

<sup>178</sup> See Jere Glover, Opinion, *Trump Is Right About One Thing: 'The Economy Does Better Under the Democrats'*, FORBES (Nov. 7, 2016, 10:28 AM), <https://www.forbes.com/sites/realspin/2016/11/07/trump-is-right-about-one-thing-the-economy-does-better-under-the-democrats/> (agreeing with Donald Trump's 2004 statement that "the economy does better under the Democrats than the Republicans").

<sup>179</sup> See *id.*

<sup>180</sup> See *How Tax Cuts Became Central to the Republican Party*, RUSSELL SAGE FOUND. (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).

<sup>181</sup> See Tim Worstall, Opinion, *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/>.

2000, pushed through a tax cut, largely benefitting the wealthiest Americans.<sup>182</sup> Amazingly, despite strong evidence to the contrary, Republicans have claimed that tax cuts pay for themselves.<sup>183</sup> Trump's "greatest" accomplishment was yet another massive tax cut for the wealthiest Americans.<sup>184</sup> Remarkably silent were deficit hawks in the Republican Party.<sup>185</sup>

The long-term effects of Trump's tax cuts may include the need to cut safety net protections.<sup>186</sup> Despite Trump's promises to maintain Social Security, his tax policy may endanger such programs.<sup>187</sup> Economists have expressed surprise that the increased deficit has not led to inflation.<sup>188</sup> If it does, cutting government spending may be a necessary response.<sup>189</sup> 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

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<sup>182</sup> See Emily Horton, *The Legacy of the 2001 and 2003 "Bush" Tax Cuts*, CTR. BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/federal-tax/the-legacy-of-the-2001-and-2003-bush-tax-cuts> (Oct. 23, 2017) (offering general information about the Bush tax cuts).

<sup>183</sup> 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).

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

<sup>185</sup> See Paul Krugman, Opinion, *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").

<sup>186</sup> See generally Seth Hanlon et al., *Trump's Budget Reveals That He Wants Everyday Americans to Pay for His Tax Cuts for the Wealthy*, CTR. FOR AM. PROGRESS (Feb. 12, 2018), <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).

<sup>187</sup> See Paul N. Van de Water, *Trump Payroll Tax Action Won't Work, Could Endanger Social Security and Budget*, CTR. ON BUDGET & POL'Y 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).

<sup>188</sup> Sylvan Lane, *Top Fed Official Sees Low Inflation Running Through 2022*, HILL (Feb. 17, 2021, 11:38 AM), <https://thehill.com/policy/finance/539203-top-fed-official-sees-low-inflation-running-through-2022>.

<sup>189</sup> Leslie Kramer, *How Do Governments Reduce Inflation?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/111314/what-methods-can-government-use-control-inflation.asp> (Jan. 12, 2022).

Security and Medicare.<sup>190</sup> Notable far-right economic libertarians have long argued that such programs are immoral.<sup>191</sup> 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.<sup>192</sup> While news reports suggested that the Koch brothers opposed Trump, as they surely did on tariffs,<sup>193</sup> many of Trump's policies advanced their extremist policies. Trump's conduct in exploding the deficit may result in advancing such rightwing policies as cutting Social Security and Medicare.<sup>194</sup> But the overlap of far-right policy positions and the Republican Party should surprise no one. Charles Koch and other far-right advocates are at home in the current Republican Party.<sup>195</sup>

There is more. What about climate change and environmental protection? Trump is a climate-change denier.<sup>196</sup> 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.<sup>197</sup> Trump's response was, "I don't think science knows" what is happening.<sup>198</sup> When Wade Crowfoot, California Secretary

<sup>190</sup> Mark Miller, *Social Security and the U.S. Deficit: Separating Fact from Fiction*, REUTERS (Nov. 1, 2018, 3:15 AM), <https://www.reuters.com/article/us-column-miller-socialsecurity/social-security-and-the-u-s-deficit-separating-fact-from-fiction-idUSKCN1N64GR>.

<sup>191</sup> Robert Greenwald, *The Koch Brothers' Campaign to Kill Social Security*, GUARDIAN (June 22, 2011, 12:30 PM), <https://www.theguardian.com/commentisfree/cifamerica/2011/jun/22/koch-brothers-social-security>; see also NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* (2017).

<sup>192</sup> MACLEAN, *supra* note 191, at 133–40.

<sup>193</sup> Brian Schwartz, *Conservative Billionaire Koch Brothers' Network Denounces Trump's Tariffs on EU, Canada and Mexico*, CNBC, <https://www.cnbc.com/2018/05/31/conservative-koch-brothers-network-denounces-trump-tariffs.html> (May 31, 2018, 4:33 PM).

<sup>194</sup> See Jeff Stein & Erica Werner, *Trump Proposes \$4.8 Trillion Election-Year Budget with Big Domestic Cuts*, WASH. POST (Feb. 10, 2020), <https://www.washingtonpost.com/business/2020/02/09/trump-budget-plan-would-fail-eliminate-deficit-over-10-years-briefing-document-shows/> (reporting that a proposed White House budget would "wring savings from Medicare despite Trump's repeated promises to safeguard Medicare and Social Security").

<sup>195</sup> See Alexander Hertel-Fernandez & Theda Skocpol, *Five Myths About the Koch Brothers — And Why It Matters to Set Them Straight*, MOYERS (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. *Id.*

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

<sup>197</sup> 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>.

<sup>198</sup> Peter Baker, Lisa Friedman & Thomas Kaplan, *As Trump Again Rejects Science, Biden*

for Natural Resources, warned of continuing problems created by a warming planet, Trump shot back, “It’ll start getting cooler. You just watch.”<sup>199</sup>

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

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

“Conservative” President Richard Nixon created the EPA even before Congress enacted legislation to establish the agency.<sup>205</sup> The EPA’s jobs include environmental assessment, research, and education.<sup>206</sup> The agency has the authority to create regulations and to enforce them, even criminally.<sup>207</sup> Its staff, even with recent efforts by the Republican Party to curtail EPA power, exceeds 15,000 employees.<sup>208</sup> Many of

*Calls Him a ‘Climate Arsonist’*, N.Y. TIMES, <https://www.nytimes.com/2020/09/14/us/politics/trump-biden-climate-change-fires.html> (Jan. 20, 2021).

<sup>199</sup> *Id.*

<sup>200</sup> 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, “a city once synonymous with the rich coal seam that runs beneath it”).

<sup>201</sup> See Nadia Popovich, Livia Albeck-Rupka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More than 100 Environmental Rules. Here’s the Full List*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> (Jan 20, 2021); Brady Dennis, *Trump Taps Climate-Change Skeptic to Oversee EPA Transition*, WASH. 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).

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

<sup>203</sup> *Id.*

<sup>204</sup> See 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/> (explaining how President Nixon, together with a Democratic Congress, worked to establish environmental legislation).

<sup>205</sup> See generally *The Origins of EPA*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/history/origins-epa> (last visited June 2, 2022) (describing how the EPA was created).

<sup>206</sup> See generally *Our Mission and What We Do*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited June 2, 2022).

<sup>207</sup> See *id.*; see also *Criminal Enforcement Overview*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/enforcement/criminal-enforcement-overview> (last visited June 2, 2022).

<sup>208</sup> *What Kind of People Work at EPA?*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov>.

those employees are engineers, scientists, and environmental specialists.<sup>209</sup>

For most of its history, the EPA has earned the support of nearly all Americans.<sup>210</sup> It has helped improve air and water quality, and its scientists have had authorization to follow good scientific practices and to prepare scientifically sound reports.<sup>211</sup> Importantly, the agency also appropriately weighed in on climate change.<sup>212</sup>

A large percentage of Americans support the agency.<sup>213</sup> 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.<sup>214</sup> In the past decade, climate change has become a divisive political issue.<sup>215</sup> 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.<sup>216</sup>

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

gov/careers/what-kind-people-work-epa (last visited June 2, 2022).

<sup>209</sup> See *id.*

<sup>210</sup> See Meyer, *supra* note 204.

<sup>211</sup> See *id.*

<sup>212</sup> See generally *Environmental Protection Agency*, GLOB. CHANGE, <https://www.globalchange.gov/agency/environmental-protection-agency> (last visited June 2, 2022) (offering general information about the EPA's research about climate change).

<sup>213</sup> See Meyer, *supra* note 204 (noting that "a large majority of Americans tell pollsters that they approve of [the EPA]").

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

<sup>215</sup> See Cary Funk & Meg Hefferon, *U.S. Public Views on Climate and Energy*, PEW RSCH. CTR. (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).

<sup>216</sup> 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).

<sup>217</sup> See INDUSTRY OPPOSITION TO GOVERNMENT REGULATION, PEW ENV'T GRP. (2010), <https://www.pewtrusts.org/-/media/assets/2011/03/industry-clean-energy-factsheet.pdf> (reviewing instances where various industries have opposed environmental regulations).

<sup>218</sup> *Dark Money* by Jane Mayer and *Democracy in Chains* by Nancy MacLean are only two books detailing the influence of the rightwing on American politics, most notably, on the Republican Party. See JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016); MACLEAN, *supra* note 191.

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

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

Trump's environmental policy dovetails with the anti-science and anti-EPA drumbeat of the far-right.<sup>226</sup> Some of those steps have included limiting EPA scientists from publishing their reports,<sup>227</sup> curtailing gas mileage standards,<sup>228</sup> changing

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<sup>219</sup> See James Jacoby, Anya Bourg & Frank Koughan, *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).

<sup>220</sup> See *id.*; see also Jane Mayer, "Kochland" Examines the Koch Brothers' Early, Crucial Role in Climate Change Denial, *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>.

<sup>221</sup> 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).

<sup>222</sup> See generally Douglas Kellner, *Bushspeak and the Politics of Lying: Presidential Rhetoric in the "War on Terror"*, 37 *PRESIDENTIAL STUD. Q.* 622 (2007) (analyzing how the Bush Administration advanced a rightwing agenda with the use of rhetoric and the U.S. media).

<sup>223</sup> See Dominic Tierney, *Is Trump Obama's Dark Doppelgänger*, *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).

<sup>224</sup> See Jeff Nesbit, *The Secret Origins of the Tea Party*, *TIME* (2016), <https://time.com/secret-origins-of-the-tea-party/> (describing the origins of the Tea Party).

<sup>225</sup> 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>.

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

<sup>227</sup> Romany Webb, Lauren Kurtz & Susan Rosenthal, *When Politics Trump Science: The Erosion of Science-Based Regulation*, 50 *ENV'T L. REP.* 10,708, 10,708–09 (2020).

<sup>228</sup> See Juliet Eilperin & Brady Dennis, *Trump Administration to Finalize Weaker Mileage Standards, Dealing a Blow to Obama-Era Climate Policy*, *WASH. POST* (Mar. 30, 2020), <https://www.washingtonpost.com/health/2020/03/30/trump-mileage-standards-environment/> (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%).



air quality standards to allow greater use of coal, despite its high CO<sub>2</sub> emissions,<sup>229</sup> and proposing substantial cuts to the agency's budget.<sup>230</sup>

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 rightwing organizations.<sup>231</sup> They had a strong ally in Trump.<sup>232</sup>

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.<sup>233</sup> As mentioned above, at one point, Republicans were environmentalists.<sup>234</sup> Before Reagan was able to mobilize the religious right around overruling *Roe*, many Republicans favored abortion rights.<sup>235</sup> Many Republicans joined efforts to expand civil rights, back when they could say with a straight face that they belonged to the party of Lincoln.<sup>236</sup> But their narrative that they left the party or opposed Trump because he

<sup>229</sup> 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).

<sup>230</sup> Webb et al., *supra* note 227, at 10,711.

<sup>231</sup> See, e.g., Sally Hardin & Claire Moser, *Climate Deniers in the 116th Congress*, CTR. FOR AM. 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).

<sup>232</sup> See Shear & Davenport, *supra* note 196 (explaining how Trump and his environmental officials have “mocked, denied, or minimized” climate change).

<sup>233</sup> See, e.g., “Donald Trump Is Not Representative of the Republican Party That I Fell in Love with.”, REPUBLICAN VOTERS AGAINST TRUMP, <https://rvat.org/#homePageStories> (last visited June 2, 2022) (showing stories of Republicans and former Republicans who reliably supported the party but do not support the Trump Administration).

<sup>234</sup> See, e.g., *The Origins of EPA*, *supra* note 205 (explaining how Republican President Richard Nixon created the EPA).

<sup>235</sup> 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 was penned by Nixon appointee Justice Harry Blackmun and joined by Republican appointees including Justices Burger, Brennan, Stewart, Blackmun, and Powell. See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>236</sup> See *The Civil Rights Movement and the Second Reconstruction, 1945–1968*, HIST., ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/> (last visited June 2, 2022) (offering examples of Republicans working to expand civil rights, including the 138 House Republicans who helped to pass the Civil Rights Act of 1964).

was an aberration ignores many areas where Trump advanced policies that were part of the Republican agenda long before he was elected in 2016.<sup>237</sup>

## II. THE REPUBLICANS MOVE TO THE RIGHT; THE DEMOCRATS MOVE TO THE LEFT: A FAMILIAR TROPE

To hear prominent Republican senators, like Lindsay Graham and Mitch McConnell, for example, in voting against Judge Ketanji Brown Jackson's nomination to the Supreme Court, Democratic presidents appoint judges outside the mainstream.<sup>238</sup> By comparison, as when then-President Trump nominated Judge Neil Gorsuch to the Court, his supporters characterized him as "mainstream."<sup>239</sup> 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.<sup>240</sup> Of course, Democrats have portrayed Republicans as moving far to the right of center.<sup>241</sup>

Many Americans who consider themselves centrists often incant a familiar trope: The Republicans have moved to the right and the Democrats have moved to

<sup>237</sup> See Jamelle Bouie, Opinion, *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> (asserting that Trump has merely been perpetuating policies and ideas that have persisted throughout Republican history).

<sup>238</sup> Maya Wiley, *We Know Who the Real Judicial Extremist Is, and It Isn't Ketanji Brown Jackson*, NEW REPUBLIC (Apr. 12, 2022), <https://newrepublic.com/article/166080/mitch-mcconnell-not-ketanji-brown-jackson-judicial-extremist>.

<sup>239</sup> Eugene Kiely, *Gorsuch's 'Mainstream' Measurement*, FACTCHECK.ORG, <https://www.factcheck.org/2017/04/gorsuchs-mainstream-measurement/> (Apr. 7, 2017).

<sup>240</sup> Dan Balz, *Trump and Republicans Attack Biden as Tool of the Left, Agent of Socialism*, WASH. POST (Aug. 24, 2020), [https://www.washingtonpost.com/politics/biden-attacks-republican-convention/2020/08/24/434e5b46-e66d-11ea-970a-64c73a1c2392\\_story.html](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, <https://www.nbcnews.com/politics/2020-election/trump-claims-without-evidence-biden-controlled-people-dark-shadows-n1238953> (Sept. 1, 2020, 8:44 AM) (reporting that President Trump alleged in an interview with conservative talk-show host Laura Ingraham that Joe Biden was being controlled by "[p]eople 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.")

<sup>241</sup> See generally GEOFFREY KABASERVICE, *RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY* (2012).

the left.<sup>242</sup> For some centrists, that trope could give them a reason not to vote.<sup>243</sup> 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.<sup>244</sup> As Republicans tried to portray Democrats in the recent election cycle, a Democratic victory would usher in socialism.<sup>245</sup> 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 extreme economic libertarian Republican benefactors, including Charles Koch and other extremists.<sup>246</sup>

While some commentators argue that the United States no longer has a political center,<sup>247</sup> as developed in this Part, 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 the Republican Party, one should not be surprised that its policies would be closer to the majority of Americans.<sup>248</sup> True, while the Democratic Party includes a few members of Congress who espouse

<sup>242</sup> See Chris Cillizza, *Half of Americans Think the Democratic Party Has Moved Too Far Left*, CNN, <https://www.cnn.com/2019/10/24/politics/democratic-party-left-liberal-q-poll/index.html> (Oct. 24, 2019, 9:33 PM); see also PEW RSCH. CTR., *THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER 7–9* (Oct. 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 . . .”).

<sup>243</sup> 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) (noting that “those who fall into the political middle” do not turn out to vote as often as those who are “the most ideologically extreme” and arguing that as political parties have become increasingly polarized “[t]he political middle now finds themselves not welcome in either party”).

<sup>244</sup> See David Smith, *‘America v Socialism’: Conservatives Rage Against the Left and Plot New Red Scare*, GUARDIAN (Mar. 1, 2020, 1:30 AM), <https://www.theguardian.com/us-news/2020/mar/01/trump-conservatives-socialism-bernie-sanders-politics>.

<sup>245</sup> *Id.*

<sup>246</sup> See generally MACLEAN, *supra* note 191; MAYER, *supra* note 218; KABASERVICE, *supra* note 241.

<sup>247</sup> E.g., Chinoy, *supra* note 8; Eric Levitz, *Democrats Can Abandon the Center — Because the Center Doesn’t Exist*, N.Y. INTELLIGENCER (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 (Sept. 1, 1996), <https://www.brookings.edu/articles/the-disappearing-political-center-congress-and-the-incredible-shrinking-middle/>.

<sup>248</sup> John Gramlich, *What the 2020 Electorate Looks like by Party, Race and Ethnicity, Age, Education and Religion*, PEW RSCH. 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).

relatively leftwing views, they do not dominate the party.<sup>249</sup> For better or worse, given anti-democratic institutions within the United States, including the Senate and Electoral College,<sup>250</sup> the Democratic Party has gravitated towards the center to appeal to a broad base of Americans.<sup>251</sup>

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.<sup>252</sup> 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.<sup>253</sup> 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.<sup>254</sup>

Take low hanging fruit: abortion rights. Since Ronald Reagan courted the religious right, every Republican presidential candidate has indicated the Court should overturn *Roe v. Wade*.<sup>255</sup> That stance has kept loyal single-issue voters whose

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<sup>249</sup> See Perry Bacon, Jr., *The Six Wings of the Democratic Party*, FIVETHIRTYEIGHT (Mar. 11, 2019, 5:56 AM), <https://fivethirtyeight.com/features/the-six-wings-of-the-democratic-party/> (labeling the most liberal members of Congress "Super Progressives" and noting that they are "a fairly small bloc in terms of Democratic elected officials").

<sup>250</sup> 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>; see *supra* text accompanying note 15.

<sup>251</sup> See *infra* Part IV.

<sup>252</sup> See *supra* Part I.

<sup>253</sup> See, e.g., *Abortion*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited June 2, 2022) (reporting that, in May 2020, 79% of Americans thought 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 RSCH. CTR. (Oct. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/10/16/share-of-americans-who-favor-stricter-gun-laws-has-increased-since-2017/> (reporting that, in September 2019, 60% of Americans believed gun laws should be stricter); 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>.

<sup>254</sup> See, e.g., 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/>.

<sup>255</sup> E.g., Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC, <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html> (Oct. 19, 2016, 10:00 PM) (Trump); 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/> (Romney); Tom Curry, *Roe v. Wade Makes Campaign Comeback*, NBC NEWS (Aug. 29, 2008), <https://www.nbcnews.com/id/>

economic interests and views on other cultural issues might otherwise lead them to vote for Democratic candidates.<sup>256</sup> Republican candidates for other offices, as well, have almost always adhered to the anti-abortion plank in the Republican Party platform.<sup>257</sup>

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,<sup>258</sup> Democrats rally around support for *Roe*.<sup>259</sup> 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*.<sup>260</sup> Support for abortion rights is not only strong among Democrats but among Americans generally.<sup>261</sup> Before Reagan captured the anti-abortion, pro-life vote, many Republicans supported abortion rights, including most of the Republican justices on the *Roe* Court.<sup>262</sup> Today, most Republicans oppose abortion.<sup>263</sup> Nationwide, however, a significant majority of Americans favor abortion rights and have done so for many years.<sup>264</sup>

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wbna26460555 (McCain and Palin).

<sup>256</sup> 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 RSCH. CTR. (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*, NPR (Sept. 17, 2020, 5:00 AM), <https://www.npr.org/2020/09/17/913589176/the-complicated-importance-of-abortion-to-trump-voters>.

<sup>257</sup> Kristina Peterson, *House Republicans Now Unanimous in Opposing Abortion Rights*, WALL ST. J. (Mar. 21, 2019), <https://www.wsj.com/articles/house-republicans-now-unanimous-in-opposing-abortion-rights-11553172954>.

<sup>258</sup> E.g., Kristen Day, Opinion, *Pro-life Democrats Must Stand Against Party's Abortion Litmus Test*, HILL (Oct. 5, 2017, 1:10 PM), <https://thehill.com/opinion/civil-rights/354063-pro-life-democrats-must-stand-against-partys-abortion-litmus-test> (noting that prominent Democrats, Kamala Harris, Nancy Pelosi, and Jerry Brown, "have come out against a litmus test on abortion").

<sup>259</sup> See *Abortion Trends by Party Identification*, GALLUP, <https://news.gallup.com/poll/246278/abortion-trends-party.aspx> (last visited June 2, 2022) (reporting that, in 2021, 91% of Democrats thought abortion should be legal in some or all circumstances).

<sup>260</sup> See Melissa Quinn, Grace Segers & Stefan Becket, *"I Assure You I Have My Own Mind": Democrats Grill Amy Coney Barrett in Hearings*, CBS NEWS, <https://www.cbsnews.com/live-updates/amy-coney-barrett-confirmation-hearings-day-3-recap/> (Oct. 15, 2020, 7:51 AM); Ariane de Vogue, *Democrats Try to Pin Barrett down on Roe v. Wade and Abortion Rights*, CNN, <https://www.cnn.com/2020/10/13/politics/abortion-amy-coney-barrett-hearing/index.html> (Oct. 13, 2020, 7:58 PM).

<sup>261</sup> See *Abortion Trends by Party Identification*, *supra* note 259; *Abortion*, *supra* note 253.

<sup>262</sup> MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 133–62 (2016).

<sup>263</sup> See *Abortion Trends by Party Identification*, *supra* note 259.

<sup>264</sup> *Abortion*, *supra* note 253 (polling the public on the legality of abortion access from 1975

Yet another fault line in the culture wars is LGBTQ rights. Rightwing icon Justice Antonin Scalia railed against reconceptualizing the Constitution to advance homosexual rights, including same sex marriage.<sup>265</sup> He accused other justices of advancing the “homosexual agenda.”<sup>266</sup> He claimed that his fellow justices were not representative of the views of Americans generally.<sup>267</sup> 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.<sup>268</sup> Even before Pope Francis announced support for recognition of same sex unions, 70% of Americans said that they supported same sex marriage.<sup>269</sup>

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.<sup>270</sup> 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.<sup>271</sup>

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to present); *see also* *Public Opinion on Abortion*, PEW RSCH. CTR., <https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/> (May 6, 2021) (“Currently, 59% say abortion should be legal in all or most cases, while 39% say it should be illegal in all or most cases.”).

<sup>265</sup> *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627–31 (2015) (Scalia, J., dissenting); *United States v. Windsor*, 570 U.S. 744, 791–94 (2013) (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, 636–53 (1996) (Scalia, J., dissenting) (defending an amendment to the Colorado Constitution that stripped “homosexual persons” of anti-discrimination protections).

<sup>266</sup> *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

<sup>267</sup> *Id.* at 602–03.

<sup>268</sup> REPUBLICAN NATIONAL CONVENTION, REPUBLICAN PLATFORM 2016, at 11 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL%5B1%5D-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf) [hereinafter REPUBLICAN PARTY PLATFORM] (“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.”). The Republican National Committee did not produce a new platform in 2020, “instead passing a resolution renewing what delegates enacted in 2016.” Reid J. Epstein, *The G.O.P. Delivers Its 2020 Platform. It’s from 2016.*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/us/politics/republicans-platform.html>.

<sup>269</sup> Scottie Andrew, *70% of Americans Support Same-Sex Marriage—A New High—A New Survey Finds*, CNN, <https://www.cnn.com/2020/10/22/us/same-sex-marriage-support-increases-trnd/index.html> (Oct. 22, 2020, 6:14 PM). While historically Republicans have not supported same sex marriage, a recent Gallup poll found that Republicans “show majority support in 2021 for the first time (55%).” *See* Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, GALLUP (June 8, 2021), <https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx>.

<sup>270</sup> *See supra* Part I.

<sup>271</sup> Meyer, *supra* note 204.

Several writers have traced the Republican Party's abandonment of environmental protection as a policy priority.<sup>272</sup> Worse, they have identified how extreme rightwing economic libertarian individuals and organizations have transformed the Republican Party's commitment to the environment to a war on the EPA.<sup>273</sup> That war has included a broader war on science.<sup>274</sup>

Here, like abortion, many Republicans now support the national platform position on climate change.<sup>275</sup> Happily for the planet, many younger Republicans differ from their elders.<sup>276</sup> An overwhelming percentage of Democrats want greater federal action against climate change; one should not be surprised that their position is consistent with most Americans.<sup>277</sup> 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.<sup>278</sup> Once again, the Democratic position on a major policy question has significant majority support.<sup>279</sup> President Trump is not alone in defying those views.

<sup>272</sup> *E.g.*, JAMES MORTON TURNER & ANDREW C. ISENBERG, *THE REPUBLICAN REVERSAL: CONSERVATIVES AND THE ENVIRONMENT FROM NIXON TO TRUMP* (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").

<sup>273</sup> See Jonathan H. Adler, *The Conservative Record on Environmental Policy*, 39 *NEW ATLANTIS*, Summer 2013, 133 (reviewing JUDITH A. LAYZER, *OPEN FOR BUSINESS: CONSERVATIVES' OPPOSITION TO ENVIRONMENTAL REGULATION* (2014)); John Nichols, *The Once Common Republican Environmentalist Is Virtually Extinct*, *NATION* (Aug. 13, 2019), <https://www.thenation.com/article/archive/republican-environmentalist-virtually-extinct/>; Christopher Sellers, *How Republicans Came to Embrace Anti-environmentalism*, *VOX*, <https://www.vox.com/2017/4/22/15377964/republicans-environmentalism> (June 7, 2017, 8:19 AM).

<sup>274</sup> See CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* (2005); Steve Benen, *The Republican War on Science Intensifies in the Trump Era*, *MSNBC*, <https://www.msnbc.com/rachel-maddow-show/the-republican-war-science-intensifies-the-trump-era-msna977021> (Mar. 30, 2017, 7:47 AM). The Republican Party's disastrous response to the global COVID-19 pandemic is symptomatic of this larger disdain for science. See Jonathan Chait, *American Death Cult: Why Has the Republican Response to the Pandemic Been so Mind-Bogglingly Disastrous?*, *N.Y. INTELLIGENCER* (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?*, *GUARDIAN* (May 3, 2020, 5:00 AM), <https://www.theguardian.com/us-news/2020/may/03/science-donald-trump-coronavirus>.

<sup>275</sup> REPUBLICAN PARTY PLATFORM, *supra* note 268, at 17–22.

<sup>276</sup> Jeff Brady, *'Light Years Ahead' of Their Elders, Young Republicans Push GOP on Climate Change*, *NPR* (Sept. 25, 2020, 5:00 AM), <https://www.npr.org/2020/09/25/916238283/light-years-ahead-of-their-elders-young-republicans-push-gop-on-climate-change>.

<sup>277</sup> Funk & Hefferon, *supra* note 215.

<sup>278</sup> *Id.*

<sup>279</sup> In 2019, 65% of Americans agreed with the statement: "[P]rotection of the environment should be given priority, even at the risk of curbing economic growth." *Environment*, *GALLUP*, <https://news.gallup.com/poll/1615/environment.aspx> (last visited June 2, 2022).

Erosion of environmental protection has been part of the Republican agenda dating back to Ronald Reagan's presidency and continuing through George W. Bush's presidency.<sup>280</sup>

Perhaps Trump's signature "accomplishment" was the 2017 change to the tax laws.<sup>281</sup> Trump slashed tax rates.<sup>282</sup> Whatever else establishment Republicans say about their disapproval of Trump, they and he were on the same page when it came to cutting taxes.<sup>283</sup> Indeed, for years, Republican politicians have claimed that tax cuts were the solution for virtually any problem that the United States faced.<sup>284</sup> As Stuart Stevens, a former Republican 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, longtime head of Americans for Tax Reform.<sup>285</sup> Extreme rightwing libertarians, including Charles Koch and many others on the far right, support massive tax cuts and the shrinking of the federal government.<sup>286</sup>

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

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<sup>280</sup> See Meyer, *supra* note 204.

<sup>281</sup> Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

<sup>282</sup> Peter Frintzilas, *Economic Effects of the Tax Cuts and Jobs Act*, FORDHAM J. CORP. & FIN. L.: BLOG (Dec. 19, 2019), <https://news.law.fordham.edu/jcfl/2019/12/19/economic-effects-of-the-tax-cuts-and-jobs-act/> (noting the TCJA cut federal corporate income tax rate from 35% to 21%); see also Ivalina Kalcheva, James M. Plečnik, Hai Tran & Jason Turkiela, *(Un)intended Consequences? The Impact of the 2017 Tax Cuts and Jobs Act on Shareholder Wealth*, 118 J. BANKING & FIN. 105,860 (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.").

<sup>283</sup> Thomas Kaplan & Alan Rappoport, *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> (noting that there were "no Republican defections" in the vote).

<sup>284</sup> See REPUBLICAN PARTY PLATFORM, *supra* note 268, 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/>.

<sup>285</sup> STEVENS, *supra* note 94, at 147; see also *About the Pledge*, AMS. FOR TAX REFORM, <https://www.atr.org/about-the-pledge/> (last visited June 2, 2022).

<sup>286</sup> See generally MAYER, *supra* note 218, at 4; ROBERT CHERNOMAS & IAN HUDSON, *THE PROFIT DOCTRINE: ECONOMISTS OF THE NEOLIBERAL ERA* 27–34 (2017) (explaining that rightwing think tanks and other libertarian business-group organizations have been influencing government policy for decades).



25% and 36% support, depending on the poll.<sup>287</sup> Not surprisingly, most Republicans supported the law; most Democrats did not.<sup>288</sup> But as with other Republican positions, most Americans did not support the Republican initiative,<sup>289</sup> 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.<sup>290</sup> This change dates to the Reagan Era and has continued and worsened under both the Bush and Trump administrations.<sup>291</sup> Few Americans support such income inequality.<sup>292</sup> Despite the Republican Party's role in creating income inequality, even most Republicans support federal efforts to reduce that inequality.<sup>293</sup>

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.<sup>294</sup>

<sup>287</sup> 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/> (“In a Quinnipiac University survey, just 25 percent of voters approved of the plan. Surveys from ABC News/Washington Post, CNN, Morning Consult, and YouGov put approval of the plan slightly higher, but all are still at 36 percent or lower.”).

<sup>288</sup> *Public Has Mixed Expectations for New Tax Law*, PEW RSCH. CTR. (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).

<sup>289</sup> *Id.* (reporting that, overall, only 37% of Americans approved of the TCJA).

<sup>290</sup> THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 246–49 (Arthur Goldhammer trans., The Belknap Press of Harvard Univ. Press 2014) (2013); MAYER, *supra* note 218, at 10–11; *See generally* EMMANUEL SAEZ & GABRIEL ZUCMAN, *THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY* (2019).

<sup>291</sup> PIKETTY, *supra* note 290, 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, 2:40 PM), <https://www.pbs.org/newshour/economy/making-sense/how-the-gop-tax-overhaul-compares-to-the-reagan-era-tax-bills>; Jeffrey Kucik, *How Trump Fueled Economic Inequality in America*, HILL (Jan. 21, 2021), <https://thehill.com/opinion/finance/535239-how-trump-fueled-economic-inequality-in-america>; Tami Luhby, *Bush Tax Cuts, Stock Market Widen Income Gap*, CNN MONEY (Jan. 4, 2012), [https://money.cnn.com/2012/01/03/news/economy/income\\_inequality/index.htm](https://money.cnn.com/2012/01/03/news/economy/income_inequality/index.htm).

<sup>292</sup> *See* 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 RSCH. CTR. (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/>.

<sup>293</sup> *Id.*

<sup>294</sup> *See, e.g., Preventing Gun Violence*, DEMOCRATIC NAT'L COMM., <https://democrats.org/>

Even when the nation is not in mourning over a mass shooting like the one that took place at Sandy Hook Elementary School,<sup>295</sup> an overwhelming percentage of Americans favor Democratic politicians' proposals.<sup>296</sup> Few Republican politicians join them.<sup>297</sup> Instead, they have taken the extremist view of the National Rifle Association, which has become a piggy bank for many Republicans.<sup>298</sup>

Writing for the New York Times, Sahil Chinoy provides another perspective on the political divide within the United States.<sup>299</sup> 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.<sup>300</sup> According to data accumulated by the Manifesto Project, the Republican Party has allowed its extreme rightwing elements to dominate its party positions.<sup>301</sup> That is simply not the case with Democrats. Instead, even though liberals now comprise a majority of the Democratic party, as evident with the nomination of Joe Biden, the party still needs to and does appeal to moderate voters.<sup>302</sup>

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where-we-stand/the-issues/preventing-gun-violence/ (last visited June 2, 2022); 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>.

<sup>295</sup> 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](https://www.washingtonpost.com/politics/sandy-hook-elementary-school-shooting-leaves-students-staff-dead/2012/12/14/24334570-461e-11e2-8e70-e1993528222d_story.html).

<sup>296</sup> Laura Santhanam, *Most Americans Support These 4 Types of Gun Legislation, Poll Says*, PBS (Sept. 10, 2019, 2:02 PM), <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> (reporting that, in 2021, 52% of Americans felt that “laws covering the sale of firearms should be made more strict”) (last visited June 2, 2022).

<sup>297</sup> Perry Bacon Jr., *GOP Politicians Are Much More Resistant to Gun Control than GOP Voters Are*, FIVETHIRTYEIGHT (Aug. 6, 2019, 6:00 AM), <https://fivethirtyeight.com/features/gop-politicians-are-much-more-resistant-to-gun-control-than-gop-voters/>.

<sup>298</sup> *See* Luke Johnson, *NRA's 2016 Donation to Trump's Campaign Pays Off*, FORTUNE (Aug. 21, 2019, 12:42 PM), <https://fortune.com/2019/08/21/how-much-did-nra-contribute-trump-campaign/> (reporting that the NRA “spent more than \$30 million on behalf of the Trump campaign”); *see also* Harry Enten, *The NRA Used to Be Much More Bipartisan. Now It's Mostly Just a Wing of the GOP*, CNN (Feb. 24, 2018, 8:08 AM), <https://www.cnn.com/2018/02/24/politics/nra-partisan-bipartisan-republican/index.html> (reporting that, “[i]n 2016, 98.4% of all House candidates donated to by the NRA were Republican”).

<sup>299</sup> Chinoy, *supra* note 8.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* To access the data compiled, see *Manifesto Project Main Dataset (Party Preferences)*, MANIFESTO PROJECT, <https://manifesto-project.wzb.eu/datasets> (last visited June 2, 2022).

<sup>302</sup> *See* William A. Galston & Elaine Kamarack, *Have Democrats Become a Party of the Left?*,

One needs only to think back to Bill Clinton's presidency. He coopted many Republican positions, like "end[ing] welfare as we know it."<sup>303</sup> The trend continued during President Obama's two terms in office; as summarized in one article, Democrats moved to the right "in the fruitless search for a compromise" with Republicans.<sup>304</sup> Obama's market-driven healthcare reform was modeled on former Massachusetts Governor Mitt Romney's Massachusetts plan.<sup>305</sup> Obama's efforts yielded virtually no Republican support.<sup>306</sup> Some Republicans have claimed that the Affordable Care Act is a form of Leninist socialism.<sup>307</sup>

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BROOKINGS (July 23, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/23/have-democrats-become-a-party-of-the-left/> (noting that "moderates contributed more votes to Joe Biden's victory than did liberals, as has been the case for winning Democratic presidential candidates for decades").

<sup>303</sup> Alana Semuels, *The End of Welfare as We Know It*, ATLANTIC (Apr. 1, 2016), <https://www.theatlantic.com/business/archive/2016/04/the-end-of-welfare-as-we-know-it/476322/>; see Martin Carcasson, *Ending Welfare as We Know It: President Clinton and the Rhetorical Transformation of the Anti-Welfare Culture*, 9 RHETORIC & PUB. AFFS. 655, 664, 673 (2006).

<sup>304</sup> 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/> (quoting Thomas E. Mann & Norman J. Ornstein, Opinion, *Let's Just Say It: The Republicans Are the Problem.*, WASH. POST (Apr. 17, 2012), <https://wapo.st/3we65PP>); see also Michael Grunwald, *The Victory of 'No'*, POLITICO (Dec. 4, 2016), <https://www.politico.com/magazine/story/2016/12/republican-party-obstructionism-victory-trump-214498/>.

<sup>305</sup> See Jessica Taylor, *Mitt Romney Finally Takes Credit for Obamacare*, NPR (Oct. 23, 2015, 3:47 PM), <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*, NPR (Oct. 17, 2011), <https://www.npr.org/2011/10/14/141357505/a-tale-of-two-health-plans-romney-versus-obama>.

<sup>306</sup> *Roll Call Vote 111th Congress - 1st Session*, U.S. SENATE (Dec. 24, 2009), [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00396](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396) (indicating that no Republican Senators voted in favor of the bill); see also *Obamacare Overview*, BALLOTEDIA, [https://ballotpedia.org/Obamacare\\_overview](https://ballotpedia.org/Obamacare_overview) (last visited June 2, 2022); Bill Schneider, *Column: Opposing Obamacare - GOP's Defining Issue*, REUTERS, <https://www.reuters.com/article/us-opposing-obamacare/column-opposing-obamacare-gops-defining-issue-idUSBRE99R0YU20131028> (Oct. 28, 2013, 1:49 PM).

<sup>307</sup> E.g., *Governor Bryant Calls Obamacare a "Socialist Takeover"*, WLBT, <https://www.wlbt.com/story/29408082/governor-calls-obamacare-a-socialist-takeover/> (June 25, 2015, 1:37 PM) (reporting that Mississippi Governor Phil Bryant called 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> (quoting Republican Ben Carson as saying, when discussing the ACA, "[w]hat'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'").

Leninist or not, most Americans now support the Democratic position on healthcare reform.<sup>308</sup> That does not mean support for a single-payer system.<sup>309</sup> But it does mean support for building on the Affordable Care Act and expanding its coverage.<sup>310</sup> Despite years of threatening to overturn the ACA, the Republicans have come up with no alternative.<sup>311</sup> Trump promised a great plan, keeping in place protection for pre-existing coverage, but never came forward with a legislative initiative.<sup>312</sup>

The Republicans' move to the right may have accelerated in 2010 when, financed in part by the Koch brothers, the Tea Party sprung up to challenge moderate Republicans.<sup>313</sup> 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.<sup>314</sup>

Despite his narrow Electoral College victory and loss of the popular vote, Bush made no effort to govern at the center.<sup>315</sup> Instead, his Administration attempted to

<sup>308</sup> 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>.

<sup>309</sup> See *id.* But see Bradley Jones, *Increasing Share of Americans Favor a Single Government Program to Provide Health Care Coverage*, PEW RSCH. CTR. (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>.

<sup>310</sup> *Public Opinion on Single-Payer, National Health Plans, and Expanding Access to Medicare Coverage*, KAISER FAM. FOUND. (Oct 16, 2020), <https://www.kff.org/slideshow/public-opinion-on-single-payer-national-health-plans-and-expanding-access-to-medicare-coverage/>.

<sup>311</sup> See Jonathan Cohn, *The ACA, Repeal, and the Politics of Backlash*, HEALTH AFFS. (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.

<sup>312</sup> 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/>; see also Chris Donovan & Adam Kelsey, *Fact-Checking Trump's 'Repeal and Replace' Obamacare Timeline*, ABC NEWS (Mar. 24, 2017, 5:07 PM), <https://abcnews.go.com/Politics/fact-checking-trumps-repeal-replace-obamacare-timeline/story?id=46360908>.

<sup>313</sup> MAYER, *supra* note 218, at 189, 194; see *supra* notes 224–225.

<sup>314</sup> See generally JACOB HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* (2005).

<sup>315</sup> See *id.*; *Bush and Public Opinion*, PEW RSCH. CTR. (Dec. 18, 2008), <https://www.pewresearch.org/politics/2008/12/18/bush-and-public-opinion/> (reporting that Bush exited office with 24% approval); see also Sean Wilentz, *How Bush Destroyed the Republican Party*, ROLLING STONE (Sept. 4, 2008, 4:33 PM), <https://www.rollingstone.com/culture/culture-news/how-bush-destroyed-the-republican-party-162234/>.

push policies that were far to the right of popular sentiment.<sup>316</sup> Some of those policies were rejected out of hand, like efforts to privatize Social Security.<sup>317</sup>

Like Trump, Bush claimed success in getting tax cuts passed.<sup>318</sup> The primary beneficiaries were the wealthiest Americans.<sup>319</sup> As Bush once said at a fundraising event, “This is an impressive crowd: the haves, and have-mores. Some people call you the elite, I call you my base.”<sup>320</sup> Not surprisingly, most Americans did not favor many aspects of his tax cuts, especially when pollsters asked questions about priorities, not just about whether tax cuts were good as a general matter.<sup>321</sup> They certainly did not favor the top-heavy nature of those cuts.<sup>322</sup> 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.<sup>323</sup>

These are hardly the only examples where Democratic policy positions are closer to the mainstream of America than are Republican policy positions.<sup>324</sup> But these examples should suffice to demonstrate the falsehood of the claim made by many Republicans that the Democrats have moved to the far left.<sup>325</sup> 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.<sup>326</sup> As political scientists

<sup>316</sup> See *Bush and Public Opinion*, *supra* note 315; Jacob S. Hacker & Paul Pierson, *Abandoning the Middle: The Bush Tax Cuts and the Limits of Democratic Control*, 3 PERSPS. ON POL. 33, 33 (2005).

<sup>317</sup> See William A. Galston, *Why the 2005 Social Security Initiative Failed, and What It Means for the Future*, BROOKINGS (Sept. 21, 2007), <https://www.brookings.edu/research/why-the-2005-social-security-initiative-failed-and-what-it-means-for-the-future/>.

<sup>318</sup> Andrew Glass, *President Bush Signs Tax Cut into Law, June 7, 2001*, POLITICO (June 7, 2016, 12:01 AM), <https://www.politico.com/story/2016/06/president-bush-signs-tax-cut-into-law-june-7-2001-223868>.

<sup>319</sup> Horton, *supra* note 182.

<sup>320</sup> Clip of Al Smith Memorial Dinner, C-SPAN (Oct. 19, 2000), <https://www.c-span.org/video/?c4506459/user-clip-haves-mores>.

<sup>321</sup> HACKER & PIERSON, *supra* note 10, at 49–50; *Bush and Public Opinion*, *supra* note 315.

<sup>322</sup> HACKER & PIERSON, *supra* note 10, at 50–51

<sup>323</sup> *Id.*; *Bush and Public Opinion*, *supra* note 315.

<sup>324</sup> See, e.g., *Polling the Left Agenda*, DATA FOR PROGRESS, <https://www.dataforprogress.org/polling-the-left-agenda/> (last visited June 2, 2022) (noting that several progressive policies are popular among Americans, including creating generic versions of prescription drugs, providing a public option for internet, guaranteeing jobs for those who want them, ending cash bail, and providing universal basic income).

<sup>325</sup> E.g., William A. Galston, Opinion, *Democrats Move Left, but the Center Holds*, WALL ST. J. (Aug. 14, 2020), <https://www.wsj.com/articles/democrats-move-left-but-the-center-holds-11597429469>.

<sup>326</sup> See Mayank Aggarwal, *Republican Party Is Now More Illiberal and Resembles Authoritarian Parties in India, Hungary and Turkey, Study Says*, INDEP. (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*

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.<sup>327</sup> 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.

### III. ABANDONING PRINCIPLES AND NORMS: A PURE POWER GRAB

As developed above, the Republican Party's move to the far right precedes Trump's election.<sup>328</sup> 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.<sup>329</sup> Congressional Republicans' willingness to abandon political norms has been part of that process.<sup>330</sup> This Part explores how that process has allowed Trump to appoint far rightwing judges and justices, a result that is likely to continue erosion of democracy well into the future.<sup>331</sup> Specifically, this Part 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.<sup>332</sup>

The filibuster has a long history, often frustrating the will of the majority.<sup>333</sup> For example, for many years, Dixiecrats were able to prevent civil rights legislation from getting to a floor vote in the Senate.<sup>334</sup> Often missed, however, is how the

*Scientist: Republicans Most Conservative They've Been in 100 Years*, NPR (Apr. 13, 2012, 2:24 PM), <https://www.npr.org/sections/itsallpolitics/2012/04/10/150349438/gops-rightward-shift-higher-polarization-fills-political-scientist-with-dread>.

<sup>327</sup> See generally HACKER & PIERSON, *supra* note 10 (asserting that plutocracy and far rightwing populism have overtaken the conservatism that had previously characterized the Republican Party).

<sup>328</sup> See *supra* Part II.

<sup>329</sup> *Party Affiliation*, GALLUP, <https://news.gallup.com/poll/15370/party-affiliation.aspx> (last visited June 2, 2022) (reporting that, in March 2022, 28% of Americans considered themselves Republicans, compared to 40% Independents and 30% Democrats).

<sup>330</sup> See *supra* Part II.

<sup>331</sup> See *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited June 2, 2022).

<sup>332</sup> 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>; 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-picks>. 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>.

<sup>333</sup> Sarah A. Binder, *The History of the Filibuster*, BROOKINGS (Apr. 22, 2010), <https://www.brookings.edu/testimonies/the-history-of-the-filibuster/>.

<sup>334</sup> *The Filibuster That Almost Killed the Civil Rights Act*, NAT'L CONST. CTR. (Apr. 11,

filibuster can prevent anti-democratic conduct in the federal government. This Part explores how the Republican move to the far right and the abandonment of the filibuster have allowed President Trump and Mitch McConnell to push the judiciary far to the right of most Americans. Further, this push will continue to threaten American democracy well into the future.<sup>335</sup>

In exploring the move to the far right, this Part also considers the abandonment of another norm, the use of the “blue slip,”<sup>336</sup> as a way to force a president to moderate his judicial appointments to the center, rather than to the extreme wing of his party.

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.<sup>337</sup> As part of a long-standing strategy of the right, led by the Federalist Society,<sup>338</sup> 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.<sup>339</sup> 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.<sup>340</sup>

During Democratic control of the Senate, Republicans used the filibuster to prevent judges from moving to a floor vote.<sup>341</sup> Democrats took a risk to end the

2016), <https://constitutioncenter.org/blog/the-filibuster-that-almost-killed-the-civil-rights-act/>; Dana Roberson, *The Racist Filibuster We Can't Afford to Forget*, WYNC STUDIOS (Aug. 29, 2016), <https://www.wnycstudios.org/podcasts/takeaway/segments/racist-filibuster-we-cant-afford-forget>.

<sup>335</sup> See Mark Sherman, Kevin Freking & Matthew Daly, *Trump's Court Appointments Will Leave Decades-Long Imprint*, AP NEWS (Dec. 26, 2020), <https://apnews.com/article/joe-biden-donald-trump-judiciary-coronavirus-pandemic-us-supreme-court-c37607c9987888058d3d0650eea125cd/>; Ruiz et al., *supra* note 332.

<sup>336</sup> See MITCHEL A. SOLLENBERGER, CONG. RSCH. SERV. RL32013, *THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917-PRESENT* (2003).

<sup>337</sup> Frank James, *Sen. Mitch McConnell Insists: One and Done for Obama*, NPR (Nov. 4, 2010, 12:02 PM), <https://www.npr.org/sections/itsallpolitics/2010/11/04/131069048/sen-mcconnell-insists-one-term-for-obama/>.

<sup>338</sup> See generally MICHAEL AVERY & DANIELLE MCLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013).

<sup>339</sup> Seung Min Kim, *McConnell's Historic Judge Blockade*, POLITICO (July 14, 2016, 5:16 AM), <https://www.politico.com/story/2016/07/mitch-mcconnell-judges-225455>.

<sup>340</sup> David G. Savage, *This Congress Filled the Fewest Judgeships Since 1952. That Leaves a Big Opening for Trump*, L.A. TIMES (Dec. 31, 2016, 6:00 AM), <https://www.latimes.com/politics/lan-a-judges-trump-senate-20161231-story.html/>.

<sup>341</sup> Tom McCarthy, *Senate Approves Change to Filibuster Rule After Repeated Republican Blocks*, GUARDIAN (Nov. 21, 2013, 1:35 PM), <https://www.theguardian.com/world/2013/nov/21/harry-reid-senate-rules-republican-filibusters-nominations/>.

Republican blockade.<sup>342</sup> Then-Majority Leader Harry Reid led efforts to eliminate the filibuster for judicial nominees for district and appellate courts.<sup>343</sup> By a simple majority vote, the Senate agreed to abandon the filibuster for lower courts, but not for the Supreme Court.<sup>344</sup>

Abandoning the filibuster for lower courts allowed Senate Democrats to secure approval of some of Obama's nominees.<sup>345</sup> But the filibuster was not the Republicans' only stalling device. The other device used by McConnell and his rightwing allies in the Senate was the blue slip.<sup>346</sup> The Senate has used the process for about a century, even though it is not written in the Rules of the Senate.<sup>347</sup> 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 home-state senator objects to a nominee, the blue slip is either withheld or returned with a negative response.<sup>348</sup>

Even though the rule is not in the Senate rules, during Obama's term, the Senate continued to observe the tradition.<sup>349</sup>

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.<sup>350</sup> Despite attempts to portray

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<sup>342</sup> *Id.*

<sup>343</sup> Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), <https://wapo.st/3PoQxjy>.

<sup>344</sup> *Id.*

<sup>345</sup> 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/>.

<sup>346</sup> Russell Wheeler, *Senate GOP Used "Blue Slips" to Block Obama Judicial Nominees, but Now Wants to Trash the Practice*, BROOKINGS (May 25, 2017), <https://www.brookings.edu/blog/fixgov/2017/05/25/blue-slips-and-judicial-nominees-in-senate/>.

<sup>347</sup> See SOLLENBERGER, *supra* note 336, at 5.

<sup>348</sup> *Judicial Vacancies*, AM. BAR ASS'N, [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_judiciary/judicial\\_vacancies/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_vacancies/) (Jan. 14, 2022).

<sup>349</sup> Wheeler, *supra* note 346.

<sup>350</sup> See Burgess Everett & Seung Min Kim, *Judge Not: GOP Blocks Dozens of Obama Court Picks*, POLITICO, <https://www.politico.com/story/2015/07/payback-gop-blocks-obama-judge-picks-judiciary-119743/> (July 6, 2015, 8:08 PM).



Obama as a leftist, by temperament and by policy positions, Obama was a centrist.<sup>351</sup> His unsuccessful attempt to appoint highly respected moderate Judge Merrick Garland speaks volumes on that point.<sup>352</sup> 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.<sup>353</sup>

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.<sup>354</sup> Even before the Republican-led Senate invoked the "nuclear option"<sup>355</sup> to guarantee Neil Gorsuch's appointment, Republicans were moving lower court nominees through the process with little observance to traditional restraints.<sup>356</sup>

As discussed above, Trump and his Republican Party have abandoned norms at a prodigious rate.<sup>357</sup> Since the beginning of Trump's Presidency, two Senators have chaired the Senate Judiciary Committee.<sup>358</sup> Senator Grassley, the first Chairman of the Judiciary Committee under the Trump Administration, allowed several

<sup>351</sup> See Ryan Cooper, Opinion, *The Obama Legacy Is Not What Many Liberals Think*, WEEK (Dec. 31, 2019), <https://theweek.com/articles/886685/obama-legacy-not-what-many-liberals-think>; Steve Chapman, Opinion, *I Told You Barack Obama Was a Moderate*, CHI. TRIB. (Nov. 8, 2019, 3:40 PM), <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*, BALANCE, <https://www.thebalance.com/how-do-obama-and-bush-compare-on-their-economic-policies-3305622/> (June 30, 2021); John P. Avlon, *Obama's Steady Centrism*, POLITICO (July 19, 2008, 9:20 AM), <https://www.politico.com/story/2008/07/obamas-steady-centrism-011880/>.

<sup>352</sup> See Ron Elving, *What Happened with Merrick Garland in 2016 And Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now/>.

<sup>353</sup> Cf. SOLLENBERGER, *supra* note 336, at 23, 26 (noting that the "practice of using a blue slip can be seen as a way for Senators to have a role in the selection of an individual who may have some impact on his/her state" and detailing the impact of blue slips over the years).

<sup>354</sup> See Savage, *supra* note 340.

<sup>355</sup> See Alex Seitz-Wald, *The Nuclear Option: What It Is and Why It Matters*, NBC NEWS, <https://www.nbcnews.com/politics/congress/nuclear-option-what-it-why-it-matters-n742076> (Apr. 6, 2017, 10:48 AM).

<sup>356</sup> See Dylan Matthews, *Senate Republicans Are Making It Easier to Push Through Trump's Judge Picks*, VOX, <https://www.vox.com/policy-and-politics/2017/10/13/16462128/blue-slips-senate-republican-judge-nomination-appointment/> (Nov. 16, 2017, 3:51 PM).

<sup>357</sup> See Amy Siskind, *This Is Not Normal*, WASH. POST, <https://www.washingtonpost.com/graphics/2020/outlook/siskind-list-trump-norms/> (Oct. 16, 2020) (providing 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").

<sup>358</sup> *Previous Committee Chairmen*, SENATE COMM. JUDICIARY, <https://www.judiciary.senate>.

circuit court nominees to have hearings without the support of their home-state senators.<sup>359</sup> Senator Graham followed Senator Grassley as Chair of the Judicial Committee and only selectively implemented the blue slip process.<sup>360</sup> Chairman Graham held hearings for at least one circuit court nominee who received opposition from their home-state senators.<sup>361</sup>

The threat of a filibuster could push the nominating president to appoint more centrist judges.<sup>362</sup> With that gone, the blue slip process might have worked the same way when a 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.<sup>363</sup>

McConnell, Trump, and leaders of the Federalist Society were proud of their accomplishment.<sup>364</sup> The shape of the Trump judiciary is out of step with the rest of the nation.<sup>365</sup> Most are white and “conservative,” according to a detailed report that appeared in the *New York Times*.<sup>366</sup> In an interview with NPR, the Executive Vice

gov/about/chairman/previous (last visited June 2, 2022).

<sup>359</sup> Joseph P. Williams, *Sen. Grassley Opts to Ignore Blue Slips Against Trump Judicial Nominees*, U.S. NEWS & WORLD REP. (Nov. 16, 2017, 6:07 PM), <https://www.usnews.com/news/politics/articles/2017-11-16/sen-grassley-opts-to-ignore-blue-slips-against-trump-judicial-nominees/>.

<sup>360</sup> Stephan Dinan, *Lindsey Graham: Blue Slips Won't Derail Trump Appeals Court Picks*, AP NEWS (Feb. 7, 2019), <https://apnews.com/article/f58b248ff545a09744ee29f1dc4fc3e7/>.

<sup>361</sup> Tim Ryan, *Senate Panel Advances Nominee for Third Circuit Bench*, COURTHOUSE NEWS SERV. (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, 2:49 PM), <https://www.post-gazette.com/news/politics-state/2019/07/16/Peter-Phipps-Third-circuit-confirmation-blue-slip-trump-federal-court/stories/201907160118/>.

<sup>362</sup> See Frederick A.O. Schwarz, Jr., *Saving the Supreme Court*, BRENNAN CTR. FOR JUST. (Sept. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/saving-supreme-court/> (“Filibusters (or the threat of filibusters), which required 60 votes to overcome, had perhaps been a force against overly partisan nominations, since to get to 60, a nominee usually had to win some votes of senators from the other party.”).

<sup>363</sup> See Andrew Cohen, *Trump and McConnell's Overwhelmingly White Male Judicial Appointments*, BRENNAN CTR. FOR JUST. (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.”).

<sup>364</sup> Tessa Berenson, *'We'd Like to See America Right of Center.' Mitch McConnell Explains His Strategy on Judges*, TIME (Feb. 8, 2018, 6:44 AM), <https://time.com/5138247/mitch-mcconnell-judicial-strategy/>; see also David Montgomery, *Conquerors of the Courts*, WASH. POST MAG. (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/>.

<sup>365</sup> Ruiz et al., *supra* note 332; Cohen, *supra* note 363.

<sup>366</sup> Ruiz et al., *supra* note 332.

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."<sup>367</sup> 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.<sup>368</sup> 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 option."<sup>369</sup> And, of course, Neil Gorsuch and Brett Kavanaugh would probably not be on the Court, but for the abandonment of the filibuster.<sup>370</sup>

National Public Radio legal reporter Carrie Johnson reported on Trump's appointees, trying to dissect their candidacies.<sup>371</sup> 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*.<sup>372</sup> She also noted their ties to the rightwing Federalist Society, now the surrogate for deciding who should be on the federal bench.<sup>373</sup> Another reporter estimated that all but eight of the Trump appellate judges had ties to the Federalist Society.<sup>374</sup> 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.<sup>375</sup>

Trump appointees advocated for many of the Republican causes, again as urged above,<sup>376</sup> 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

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<sup>367</sup> Carrie Johnson, *Trump's Judicial Legacy*, NPR (Aug. 2, 2019, 7:03 AM), <https://www.npr.org/2019/08/02/747520685/trumps-judicial-legacy/> (interviewing Kristine Lucius of The Leadership Conference on Civil and Human Rights).

<sup>368</sup> *Id.*

<sup>369</sup> See Ruiz et al., *supra* note 332.

<sup>370</sup> See *id.*

<sup>371</sup> See generally Johnson, *supra* note 367.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> Ruiz et al., *supra*, note 332.

<sup>375</sup> Montgomery, *supra* note 364. The process of appointing more rightwing Federalist Society endorsed candidates has a long history among Republicans, including during Bush's term. *Id.* But Trump has accelerated the process, again, in large part through the abandonment of recognized moderating processes. See *supra* Part II; see also Li Zhou, *Study: Trump's Judicial Appointees Are More Conservative than Those of Past Republican Presidents*, VOX (Jan. 25, 2019, 6:00 AM), <https://www.vox.com/2019/1/25/18188541/trump-judges-mconnell-senate/>.

<sup>376</sup> See *supra* Part II.

providers performing abortions; argued that corporations with religious owners could not be 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.<sup>377</sup>

Additionally, at least eight judges actively opposed the legalization of gay marriage and argued for Trump Administration-type immigration positions.<sup>378</sup> Additionally, close to 20 appointees worked to limit access to abortion or contraception.<sup>379</sup>

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.<sup>380</sup> 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.<sup>381</sup> Her views are hardly within the mainstream.<sup>382</sup> Her opposition to abortion rights was central to her appointment.<sup>383</sup> Equally as troubling is her opposition to the Affordable Care Act.<sup>384</sup> Some of her rulings suggest a strong pro-corporate and anti-worker, anti-union orientation.<sup>385</sup>

<sup>377</sup> Ruiz et al., *supra* note 332.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> See Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Oct. 12, 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, 5:00 PM), <https://www.scotusblog.com/2020/09/profile-of-a-potential-nominee-amy-coney-barrett/>.

<sup>381</sup> See Griffin Connolly, *Amy Coney Barrett Hearing: Lindsey Graham Defends Contentious Decision to Push Ahead with Nomination*, INDEP. (Oct. 12, 2020, 4:02 PM), <https://www.independent.co.uk/news/world/americas/us-politics/amy-coney-barrett-hearing-scotus-lindsey-graham-senate-trump-b990459.html>.

<sup>382</sup> See Liptak, *supra* note 380.

<sup>383</sup> 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, 6:00 AM), <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*, NPR (Sept. 28, 2020, 5:18 PM), <https://www.npr.org/2020/09/28/917827735/a-look-at-amy-coney-barretts-record-on-abortion-rights/>.

<sup>384</sup> Ian Millhiser, *Amy Coney Barrett's Opposition to Obamacare, Explained*, VOX (Oct. 15, 2020, 8:30 AM), <https://www.vox.com/21514900/amy-coney-barrett-obamacare-supreme-court-california-texas-nfib-king-burwell-aca/>.

<sup>385</sup> See, e.g., *Smith v. Ill. Dept. of Transp.*, 936 F.3d 554, 561 (7th Cir. 2019) (finding that, despite being subjected to repeated verbal abuse, including having been called the n-word by his supervisor, the 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 Ave. Assocs., 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-

Trump made clear a preference for young judges as well. In nominating Barrett, for example, he suggested that she might be on the Court for 50 years.<sup>386</sup> 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.<sup>387</sup>

One should not doubt the hard turn to the right. Many of Trump's appointees replaced Democratic judges.<sup>388</sup> But commentators have recognized that even when they have replaced Republican appointees, they are further to the right than the judges whom they replaced.<sup>389</sup>

As developed above, much of this change resulted from the abandonment of political norms and the right wing's unwillingness to moderate towards the political center.<sup>390</sup> As developed below, the current structure of the federal judiciary creates a continuing risk to our democracy.<sup>391</sup> This cadre of extreme rightwing judges and justices can rule in ways that protect the wealthy against most Americans.<sup>392</sup>

#### IV. THE FUTURE?

Will the recent results of the presidential and senatorial elections stop the erosion of American democracy? Will they 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.<sup>393</sup> Given that most Americans

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collection company). *See also* Elizabeth C. Tippet, *How Amy Coney Barrett Might Rule for—and Against—Workers' Rights*, FAST CO. (Oct. 9, 2020), <https://www.fastcompany.com/90562608/how-amy-coney-barrett-might-rule-for-and-against-workers-rights>.

<sup>386</sup> Peter Alexander, Garrett Haake & Adam Edelman, *Trump Has Decided to Select Amy Coney Barrett for the Supreme Court*, NBC NEWS, <https://www.nbcnews.com/politics/supreme-court/trump-has-decided-select-amy-coney-barrett-supreme-court-n1241130/> (Sept. 26, 2020, 9:33 AM).

<sup>387</sup> *See* Moiz Syed, *Charting the Long-Term Impact of Trump's Judicial Appointments*, PROPUBLICA (Oct. 30, 2020), <https://projects.propublica.org/trump-young-judges/>.

<sup>388</sup> *See* Seung Min Kim, *Trump's Conservative Imprint on the Federal Judiciary Gives Democrats a Playbook – If They Win*, WASH. POST (Oct. 26, 2020), [https://www.washingtonpost.com/politics/courts\\_law/court-barrett-senate-trump/2020/10/25/d9eed9c0-16bc-11eb-befb-8864259bd2d8\\_story.html/](https://www.washingtonpost.com/politics/courts_law/court-barrett-senate-trump/2020/10/25/d9eed9c0-16bc-11eb-befb-8864259bd2d8_story.html/).

<sup>389</sup> Tom McCarthy, *Trump's Judges: A Revolution to Create a New Conservative America*, GUARDIAN (Apr. 28, 2020, 5:00), <https://www.theguardian.com/us-news/2020/apr/28/donald-trump-judges-create-new-conservative-america-republicans>.

<sup>390</sup> *See supra* Part I.

<sup>391</sup> *See infra* Part IV.

<sup>392</sup> Adam Cohen, *How the Supreme Court Favors the Rich and Powerful*, TIME (Mar. 3, 2020, 7:00 AM), <https://time.com/5793956/supreme-court-loves-rich/>.

<sup>393</sup> *See supra* Part II.

are likely to agree with positions supported by Democrats and reject positions advanced by Republicans, one needs to ask, how can that be? The answer is not hard to find. As discussed above, the Republicans' move to the far right has been orchestrated by powerful economic interests.<sup>394</sup> The Koch brothers, the Olin Foundation, the Bradley Foundation, and other extremely wealthy Republican donors have dictated the agenda.<sup>395</sup> That agenda dates back to the 1950s.<sup>396</sup> Charles Koch and others have funded organizations like the Federalist Society that has pushed rightwing judicial views.<sup>397</sup> Indeed, the Federalist Society has endorsed almost all Trump appointees to the bench.<sup>398</sup>

Beyond the judiciary, Koch and others on the right have funded think tanks.<sup>399</sup> 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.<sup>400</sup> Contemporary Republican tax policy,<sup>401</sup> environmental policy,<sup>402</sup> and hostility to agency regulations all reflect the views of the far right.<sup>403</sup>

One might ask, how can a party that represents a minority of Americans on so many important policies 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.<sup>404</sup>

<sup>394</sup> See generally MAYER, *supra* note 218; see generally MACLEAN, *supra* note 191.

<sup>395</sup> MAYER, *supra* note 218, at 4, 93–94, 113, 118.

<sup>396</sup> *Id.* at 93.

<sup>397</sup> MAYER, *supra* note 218, at 110. See generally AVERY & MCLAUGHLIN, *supra* note 338; Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RSCH. Q. 366 (2009).

<sup>398</sup> See Montgomery, *supra* note 364. The trend of nominating Federalist Society-aligned judges dates back to the Reagan Era. See *id.*

<sup>399</sup> See MAYER, *supra* note 218, at 3.

<sup>400</sup> *Id.* at 3–4.

<sup>401</sup> See REPUBLICAN PARTY PLATFORM, *supra* note 268, 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.”).

<sup>402</sup> See *id.* at 18, 20–22 (characterizing EPA as a “regulatory juggernaut” in thrall to “environmental extremists” and stifling “progress”).

<sup>403</sup> See *id.* at 27–28 (“Over-regulation is the quiet tyranny of the ‘Nanny State.’”).

<sup>404</sup> See IRONS, *supra* note 15, at 3–58 (discussing the framing of the Constitution, the Great Compromise over slavery, and 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).

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.<sup>405</sup> 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.<sup>406</sup> But there is more.

The first President Bush was the last Republican to win the popular vote when running for his first term.<sup>407</sup> His son and Trump won because of the Electoral College.<sup>408</sup> The Electoral College skews the election to Republicans because many smaller states have disproportionate sway in deciding the election.<sup>409</sup> Combine that with the fact that Bush and Trump have together appointed five justices to the Supreme Court.<sup>410</sup> In turn, the Court has lurched to the right in ways that advance the minority party's interests.<sup>411</sup> Indeed, many of the Court's rulings are out of the extreme right wing's playbook.

<sup>405</sup> California has more than 67 times the population of Wyoming. *See QuickFacts: Wyoming*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WY> (last visited June 2, 2022) (estimating that, in July 2021, Wyoming had a total population of 578,803); *QuickFacts: California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CA/PST045219> (last visited June 2, 2022) (estimating that, in July 2021, California had a total population of 39,237,836).

<sup>406</sup> *See* Richard N. Rosenfeld, *What Democracy? The Case for Abolishing the United States Senate*, HARPER'S MAG. (May 2004), <https://harpers.org/archive/2004/05/what-democracy-the-case-for-abolishing-the-united-states-senate/>.

<sup>407</sup> Aaron O'Neill, *Share of Electoral College and Popular Votes from Each Winning Candidate, in All United States Presidential Elections from 1789 to 2020*, STATISTA (Feb. 18, 2021), <https://www.statista.com/statistics/1034688/share-electoral-popular-votes-each-president-since-1789/>.

<sup>408</sup> *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/>.

<sup>409</sup> *See* Berger & Hyman, *supra* note 404, at 135–39.; Barney Warf, *The U.S. Electoral College and Special Biases in Voter Power*, 99 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); WILLIAM C. KIMBERLING, THE ELECTORAL COLLEGE 11 (1992) (“[I]n 1988, for example, the combined voting age 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 of voting age in the State of Florida.”)

<sup>410</sup> *Justices 1789 to Present*, SUP. CT. OF U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) (last visited June 2, 2022) (indicating that President George W. Bush appointed Chief Justice Roberts and Associate Justice Alito; President Trump appointed Associate Justices Gorsuch, Kavanaugh, and Barrett).

<sup>411</sup> *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); GRAETZ & GREENHOUSE, *supra* note 262.

The Court's infamous 5–4 decision in *Citizens United* nominally gave unions and corporations the ability to give unlimited contributions to presidential candidates.<sup>412</sup> Corporate donations far exceed union contributions to political campaigns, in part, because union membership is on the decline.<sup>413</sup> That decline, too, is part of the rightwing agenda, as reflected in the Court's 5–4 decision in *Janus v. AFSCME*.<sup>414</sup> *Janus* held that requiring non-union public-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.<sup>415</sup> Uncertain is the extent of damage that *Janus* has caused unions, but anti-union hostility lurks close to the surface in such a decision.<sup>416</sup> 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.<sup>417</sup>

Even more important than allowing wealthy donors to dominate political debate by pouring millions of dollars into each election cycle<sup>418</sup> 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.<sup>419</sup> Voter suppression in the United States, especially in the Jim Crow South, has an ugly, ugly history.<sup>420</sup> For almost 50 years,

<sup>412</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010).

<sup>413</sup> See *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups*, OPEN SECRETS, <https://www.opensecrets.org/elections-overview/business-labor-ideology-split> (Apr. 18, 2022); 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>.

<sup>414</sup> See 138 S. Ct. 2448 (2018).

<sup>415</sup> *Id.* at 2460.

<sup>416</sup> See *id.* at 2471 (“The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights.”).

<sup>417</sup> See, e.g., *id.* at 2492–93 (Kagan, J., dissenting) (discussing the Court's previous caselaw dealing with the First Amendment in the public employment context, where “[t]ime and again our cases have recognized that the Government has a much freer hand' in dealing with its employees than with 'citizens at large'” (quoting *NASA v. Nelson*, 562 U.S. 134, 148 (2011))).

<sup>418</sup> 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/>.

<sup>419</sup> *SELMA* (Paramount Pictures 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>.

<sup>420</sup> 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).



the Voting Rights Act helped check voter suppression around the country.<sup>421</sup> 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.<sup>422</sup> The law passed 98–0 in the Senate.<sup>423</sup> The level of support masked Republican arguments that the law treated states, especially in the South, unfairly.<sup>424</sup>

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.<sup>425</sup> 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.<sup>426</sup> 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.<sup>427</sup>

Despite extensive hearings and findings by Congress in passing the 2006 Act, the Chief Justice disputed any need for the Act in *Shelby County*.<sup>428</sup> 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.<sup>429</sup> The Chief Justice's opinion made little effort to argue that the Court's constitutional reading was part of the Framers' original understanding.<sup>430</sup> He referred to sovereignty, reflected

<sup>421</sup> See generally ANDERSON, *supra* note 420; GARY MAY, *BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* (2013) (discussing the success of the Voting Rights Act, since its enactment, in facilitating the right to vote for African Americans and other minorities who had previously been subject to local voter suppression tactics).

<sup>422</sup> 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>.

<sup>423</sup> 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>.

<sup>424</sup> See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L. J. 174, 182–83 (2007).

<sup>425</sup> See, e.g., Antonin Scalia, *Originalism, The Lesser Evil*, 57 U. CINN. L. REV. 847, 863–64 (1989).

<sup>426</sup> Oral Argument at 17:22, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96), <https://www.oyez.org/cases/2012/12-96>.

<sup>427</sup> See, e.g., Jeffrey M. Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 219–37 (2016). *But see* Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 177 (2013) (equal sovereignty doctrine has “no basis either in constitutional text or in existing constitutional doctrine”).

<sup>428</sup> 570 U.S. at 547–50.

<sup>429</sup> *Id.* at 535 (“There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”).

<sup>430</sup> See *id.* at 543.

in the Tenth Amendment.<sup>431</sup> But, of course, the Voting Rights Act was grounded in the Fifteenth Amendment, which by any ordinary understanding superseded or limited the Tenth Amendment.<sup>432</sup>

One doubts that a good “original understanding” argument supported the majority’s opinion.<sup>433</sup> Originalist Clarence Thomas concurred in the Chief Justice’s opinion.<sup>434</sup> He referred to “basic principles of federalism” and separate sovereignty, which, according to the majority and Thomas, supported the holding.<sup>435</sup> Somehow, Thomas managed to entirely ignore the Civil War and the effect of the Civil War Amendments on those principles.<sup>436</sup> 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.<sup>437</sup>

Some commentators, like George Will, claimed that the law was outdated.<sup>438</sup> 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.<sup>439</sup>

As soon as the Court decided *Shelby County v. Holder*, Republicans ramped up extraordinary efforts to suppress the vote.<sup>440</sup> Republican legislatures in Southern

<sup>431</sup> *Id.* at 542–45.

<sup>432</sup> *See id.* at 567–68 (Ginsburg, J., dissenting).

<sup>433</sup> *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, 12:16 AM), <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).

<sup>434</sup> *Shelby Cnty.*, 570 U.S. at 557–59 (Thomas, J., concurring).

<sup>435</sup> *Id.* at 558.

<sup>436</sup> *See id.* at 567–68 (Ginsburg, J., dissenting).

<sup>437</sup> Stout, *supra* note 422; Hulse, *supra* note 423.

<sup>438</sup> George F. Will, Opinion, *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-b797cbd4cb13f9c6\\_story.html/](https://www.washingtonpost.com/opinions/george-will-supreme-court-is-correct-on-voting-rights-act/2013/06/26/b15c8d84-de81-11e2-b797cbd4cb13f9c6_story.html/).

<sup>439</sup> *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/>.

<sup>440</sup> *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/>.

states moved quickly to enact strict Voter ID laws,<sup>441</sup> reduce or eliminate early voting processes,<sup>442</sup> shut down polling places in minority communities,<sup>443</sup> and aggressively purge voter rolls.<sup>444</sup> These extreme voter-suppression efforts were, and still are, defended as supposedly necessary to combat purportedly-widespread voter fraud.<sup>445</sup> The tactics also all disproportionately affect minority communities of color.<sup>446</sup>

Shortly before the election, appellate courts consistently sided with the Trump Administration in upholding efforts to suppress the vote.<sup>447</sup> Remarkably, so too did the Supreme Court. For example, in a 5–3 decision, eight days before the election,

<sup>441</sup> 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/>.

<sup>442</sup> Penda Hair, *Why North Carolina Is the New Selma*, MSNBC, <https://www.msnbc.com/msnbc/why-north-carolina-the-selma-2015-msna544001> (Mar. 5, 2015, 2:31 PM).

<sup>443</sup> Tom McCarthy, *More than 1,000 U.S. Polling Sites Closed Since Supreme Court Ruling, Report Finds*, GUARDIAN (Sept. 11, 2019, 12:15 PM), <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. TRIB. (Nov. 4, 2016, 4:00 PM), <https://www.texastribune.org/2016/11/04/report-texas-holds-highest-number-polling-place-cl/>.

<sup>444</sup> Susan Ferriss, *Georgia Hotbed for Voter Suppression Tactics*, CTR. FOR PUB. INTEGRITY (Oct. 19, 2020), <https://publicintegrity.org/politics/elections/us-polling-places/georgia-hotbed-for-voter-suppression-tactics/>.

<sup>445</sup> 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*, 118 PNAS, Nov. 9, 2021, at e2103619118; Jim Rutenberg, *The Attack on Voting: How President Trump's False Claim of Voter Fraud Is Being Used to Disenfranchise Americans*, N.Y. TIMES MAG. (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, <https://www.nbcnews.com/news/us-news/study-finds-no-evidence-widespread-voter-fraud-n637776/> (Aug. 26, 2016, 7:10 AM); 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/>.

<sup>446</sup> See Matt DiRienzo, *Analysis: New and Age-Old Voter Suppression Tactics at the Heart of the 2020 Power Struggle*, CTR. FOR PUB. INTEGRITY (Oct. 28, 2020), <https://publicintegrity.org/politics/elections/ballotboxbarriers/analysis-voter-suppression-never-went-away-tactics-changed/>; Terry Gross, *Republican Voter Suppression Efforts Are Targeting Minorities, Journalist Says*, NPR (Oct. 23, 2018, 2:04 PM), <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 MAG. (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/>.

<sup>447</sup> Jim Rutenberg & Rebecca R. Ruiz, *Federal Appeals Courts Emerge as Crucial for Trump in Voting Cases*, N.Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/10/17/us/politics/federal-appeals-courts-trump-voting.html>.

the rightwing of the Court rejected efforts to extend the deadline for mail-in ballots in Wisconsin.<sup>448</sup> (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.<sup>449</sup>

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.<sup>450</sup> It also let stand lower court rulings from North Carolina, also extending the deadline for counting votes.<sup>451</sup> 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.<sup>452</sup> Barrett refused to signal whether she would recuse herself, given her recent appointment by Trump, under questionable circumstances.<sup>453</sup>

Since 2000, the Republicans have succeeded in achieving their power, in large part, via voter suppression.<sup>454</sup> Similar attempts failed in 2020, in part, because so many mainline Republicans abandoned the President.<sup>455</sup> But with a 6–3 extreme

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<sup>448</sup> Democratic Nat’l Comm. v. Wis. State Legis., 141 S. Ct. 28 (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/>.

<sup>449</sup> 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](https://www.washingtonpost.com/opinions/the-high-cost-of-confirming-amy-coney-barrett/2020/10/24/8d5a236a-156f-11eb-bc10-40b25382f1be_story.html).

<sup>450</sup> Robert Barnes, *Democrats in Pennsylvania, North Carolina Claim Key Wins at Supreme Court Ahead of Election*, WASH. POST (Oct. 28, 2020), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-pennsylvania-mail-ballots/2020/10/28/fe78439a-1936-11eb-82db-60b15c874105\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-pennsylvania-mail-ballots/2020/10/28/fe78439a-1936-11eb-82db-60b15c874105_story.html).

<sup>451</sup> *Id.*

<sup>452</sup> *Moore v. Circosta*, 141 S. Ct. 46, 46–48 (2020).

<sup>453</sup> Barnes, *supra* note 450.

<sup>454</sup> See DiRienzo, *supra* note 446; 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, 12:56), <https://www.theguardian.com/us-news/2019/dec/21/trump-adviser-republicans-voter-suppression/>.

<sup>455</sup> 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/>.

rightwing lock on the Court—and over 200 recently-appointed lower court judges<sup>456</sup>—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*.<sup>457</sup> But the Court changed direction. In 1968, Nixon ran, in part, against the Court, and between 1969 and 1971 he made four appointments to the Court.<sup>458</sup> That began an erosion of many Warren Court criminal procedure holdings.<sup>459</sup>

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.<sup>460</sup> Roosevelt proposed legislation that would increase the size of the Court to counterbalance its far-right leanings.<sup>461</sup> The court-packing plan failed, but the Court changed direction, beginning with centrist-Justice Owen Roberts's willingness to uphold progressive legislation and FDR's opportunity to appoint several justices during his presidency.<sup>462</sup>

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.<sup>463</sup> Even then, short of legislation packing the Court, the current members of

<sup>456</sup> See Carrie Johnson, *Wave of Young Judges Pushed by McConnell Will Be 'Ruling for Decades to Come'*, NPR (July 2, 2020, 5:01 AM), <https://www.npr.org/2020/07/02/886285772/trump-and-mcconnell-via-swath-of-judges-will-affect-u-s-law-for-decades/>; *Federal Judges Nominated by Donald Trump*, BALLOTPEDIA [https://ballotpedia.org/Federal\\_judges\\_nominated\\_by\\_Donald\\_Trump](https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump) (last visited June 2, 2022).

<sup>457</sup> 384 U.S. 436 (1966). 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. OP. Q. 288, 292 (1974) (listing the results of a 1969 Louis Harris & Associates 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); *id.* 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 "deal[ing] with criminals"); see also FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 153–93 (1970).

<sup>458</sup> James E. Clayton, *The Miranda Decision: Criminal Wrongs, Citizen Rights*, WASH. POST (Aug. 7, 1983), <https://www.washingtonpost.com/archive/entertainment/books/1983/08/07/the-miranda-decision-criminal-wrongs-citizen-rights/> ("Nixon campaigned hard against the Court in 1968 and promised to nominate only justices who would reverse a judicial philosophy he regarded as 'too soft on crime.'"); *Justices 1789 to Present*, *supra* note 410.

<sup>459</sup> COHEN, *supra* note 411, at 270–84; GRAETZ & GREENHOUSE, *supra* note 262, at 42–54.

<sup>460</sup> IRONS, *supra* note 15, at 294–306, 315–16 (discussing this period of the Court's history, including *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

<sup>461</sup> *Id.* at 312–17.

<sup>462</sup> *Id.* at 316–29.

<sup>463</sup> See Perry Bacon, Jr., *The Latest on Republican Efforts to Make It Harder to Vote*,

the Court do not seem poised to change their views. Some commentators saw a few of Chief Justice Roberts's opinions as demonstrating a willingness to protect the institution of the Court by steering towards the middle.<sup>464</sup> Some commentators questioned whether Roberts was moderating his views.<sup>465</sup> Even if Roberts were to 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.<sup>466</sup>

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.<sup>467</sup> Neither idea is a shoo-in.<sup>468</sup>

Perhaps the Court will overrule *Roe v. Wade*.<sup>469</sup> That might lessen support among religious voters who oppose abortion but who are uncomfortable with other

FIVETHIRTYEIGHT (Sept. 9, 2020, 5:55 AM), <https://fivethirtyeight.com/features/the-latest-on-republican-efforts-to-make-it-harder-to-vote/>.

<sup>464</sup> See, e.g., Stuart Gerson, *Understanding John Roberts: A Conservative Institutionalist Concerned with Durability of the Law and Respect for the Court*, JURIST (July 31, 2020, 2:17 PM), <https://www.jurist.org/commentary/2020/07/stuart-gerson-understanding-john-roberts/>; Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, ATLANTIC, <https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/> (July 14, 2020, 12:56 PM); 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/>.

<sup>465</sup> See, e.g., Victoria Bassetti, *John Roberts Is an Institutionalist, Not a Liberal*, FIN. TIMES (July 1, 2020), <https://www.ft.com/content/2248b2e3-b911-48ec-9eeb-632c0c26ab16>.

<sup>466</sup> See Russell Wheeler, *McConnell's Fabricated History to Justify a 2020 Supreme Court Vote*, BROOKINGS (Sept. 24, 2020), <https://www.brookings.edu/blog/fixgov/2020/09/24/mcconnells-fabricated-history-to-justify-a-2020-supreme-court-vote/>.

<sup>467</sup> 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”).

<sup>468</sup> 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*, NPR (Oct. 11, 2020, 6:38 PM), <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. See Gillian Brockell, *FDR Tried to Pack the Supreme Court During the Depression. It Was a Disaster for Him.*, WASH. POST. (Sept. 24, 2020), <https://www.washingtonpost.com/history/2020/09/24/fdr-supreme-court-packing-rbg-trump/>. 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.

<sup>469</sup> 410 U.S. 113 (1973) (affirming a fundamental right to privacy that protects a pregnant

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.<sup>470</sup> Perhaps the Democratic Party will increase its majority in Congress. The 2022 Senatorial race seems to favor Democrats.<sup>471</sup> But, given the reality that the Court can easily tip the balance in favor of the Republican Party by 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.

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woman's choice over whether or not to have an abortion).

<sup>470</sup> See Michael Lipka & Gregory A. Smith, *Like Americans Overall, U.S. Catholics Are Sharply Divided by Party*, PEW RSCH. CTR. (Jan. 24, 2019), <https://www.pewresearch.org/fact-tank/2019/01/24/like-americans-overall-u-s-catholics-are-sharply-divided-by-party/>.

<sup>471</sup> Louis Jacobson, *The Future Shape of the Senate*, UNIV. OF VA. CTR. FOR POL. (July 16, 2020), <https://centerforpolitics.org/crystalball/articles/the-future-shape-of-the-senate/>.