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.

Introduction ................................................................. 468
I. Abandoning Political Norms ........................................ 472
   A. A Trump Sampler .................................................. 472
   B. Competing Narratives ............................................ 483
II. The Republicans Move to the Right; the Democrats Move to the Left: A Familiar Trope ........................................... 500
III. Abandoning Principles and Norms: A Pure Power Grab ............................................. 512
IV. The Future? ............................................................. 519

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467
INTRODUCTION

Many Americans saw Donald Trump’s 2016 successful presidential bid as an anomaly, the result of several unlikely factors coalescing in his favor.¹ Prior to the 2020 election, several prominent Republicans and traditional conservatives announced their opposition to Trump.² They saw him as a radical departure from mainstream Republicanism.³ Their views fed a narrative: Trump’s contempt for political norms would be short-lived, ending with his defeat on November 3.⁴ Because so many Americans saw him as a threat to democracy, one could hear a collective sigh of relief when he lost in November.⁵ For many Americans, the election proved

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


the viability of our institutions and the restoration of our democracy.6

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

The shift to the far right is especially troubling. The views of the Republican Party do not reflect majoritarian sentiment on almost every major policy position of that party.11 Further, the shift to the right will not end with Trump’s failure to achieve a second term. Instead, strategies that Trump and other Republicans have put in place, along with institutional aspects of America’s “democracy,”12 will allow

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6 Lafond & Cabrerra, supra note 5.
7 Infra Part I.
9 Rozsa, supra note 8; Ingraham, supra note 8.
10 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 forgive 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.
11 Infra Part II.
12 Notably, the Electoral College has resulted in George W. Bush and Trump’s elections despite their loss of the popular vote. Especially under Mitch McConnell’s leadership, the Senate’s anti-democratic structure has added to the power of the plutocratic elite. 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.\textsuperscript{13}

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

\textsuperscript{13} \textit{Infra} Part III; see Ed Kilgore, \textit{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, \textit{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-Whithorn, \textit{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 . . . .”).


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

Part I reviews briefly Trump and his Administration’s contempt for political norms.\textsuperscript{20} It discusses how that contempt has led many prominent Republicans, almost all no longer in government, to abandon their support for his presidency.\textsuperscript{21} Part II explores the Republican Party’s hard turn to the far right.\textsuperscript{22} It also deconstructs the trope that the Democratic Party has moved to the left by examining public opinion polling.\textsuperscript{23} That examination demonstrates that the Democratic Party, on most major policy questions, is closer to majoritarian sentiment than is the Republican Party.\textsuperscript{24} 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

\textsuperscript{17} See Marc Fisher, Christine Spolar & Amy B. Wang, The Undecided: 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.

\textsuperscript{18} 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.

\textsuperscript{19} 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-lef-so-has-us-this-explains-how-why/.

\textsuperscript{20} Infra Part I.

\textsuperscript{21} Infra Part I.

\textsuperscript{22} Infra Part II.

\textsuperscript{23} Infra Part II.

\textsuperscript{24} Infra Part II.
one would expect, given that it is the distinct minority party. 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. Part IV examines whether the sharp trend to the right might slow and the trend’s continuing risk to our democracy.

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. Worse, he was able to distract members of the public from one scandal by changing the subject. Observers became exhausted, giving Trump an advantage, because they could not keep up with the outrage du jour.

25 Infra Part III.
26 Infra Part III.
27 Infra Part IV.
30 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.\(^31\) Picking up on that theme, Trump targeted the mainstream media.\(^32\) His constant charge about “fake news” allowed his supporters to ignore serious challenges to his Administration.\(^33\) While other presidents challenged media representatives on occasion, none made a wholesale effort to erode confidence in the mainstream media as did Trump.\(^34\)

When COVID-19 cases first started appearing in the United States, Trump’s unwillingness to accept scientific consensus about the need for swift action contributed to the pandemic.\(^35\) His inconsistent and dangerous statements about COVID-
19 resulted in unnecessary deaths. Some of his followers mindlessly scorned the use of masks. Many of his supporters contended that, based on Trump’s statements, the media overstated the extent and risk of the virus. Again, almost certainly, that kind of irresponsibility led to the unnecessary spread of the disease. 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?

Trump demonstrated a similar scorn for traditional political allies. Early and often, Trump attacked NATO and allies within NATO. He made wild and often
false claims about NATO allies.\textsuperscript{42} He threatened to dismantle an organization that has contributed to international stability for over 70 years.\textsuperscript{43} 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.\textsuperscript{44} Repeatedly, his polices seemingly pleased Russian President Vladimir Putin.\textsuperscript{45} Weakening


NATO plays directly into Putin’s vision of a revitalized role for Russia.\textsuperscript{46} Not only did Trump praise Putin and criticize our important allies, he also chose to believe Putin’s obvious lie that Russia did not interfere in the 2016 presidential election.\textsuperscript{47} Choosing to believe Putin forced Trump to repudiate the findings of the intelligence community in the United States.\textsuperscript{48} But then, members of the intelligence community and of law enforcement were, according to Trump, part of the deep state out to get him.\textsuperscript{49} Trump’s treatment of then-Ambassador to Ukraine...
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.\(^{50}\) 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.\(^{51}\)

Despite election campaign claims in 2016 that he would drain the swamp, Trump, as measured by the number of members of his Administration who were found guilty or plead guilty to a variety of criminal charges, led the most corrupt government in U.S. history.\(^{52}\) 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.\(^{53}\) Not only does the commutation seem


\(^{53}\) 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.

redactions, should recognize that Mueller admitted being unable to get evidence about Trump’s knowledge about the meetings.61 More importantly, while Mueller took the position that he was not authorized to conclude whether Trump committed crimes, the report strongly hints that Trump obstructed justice in several instances.62

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


 U.S. CONST. art. I, § 9, cl. 8.


questionable deductions that may amount to tax fraud.\textsuperscript{66} Trump showed extraordinary contempt for international agreements and organizations. He pulled out of the 2015 Paris Accords,\textsuperscript{67} the Transpacific Partnership,\textsuperscript{68} and the World Health Organization.\textsuperscript{69} He began tariff wars with political rivals and allies, almost aimlessly.\textsuperscript{70} He adopted anti-immigrant positions that appealed to racism and that violated basic human rights.\textsuperscript{71}


Many presidents have gained national support in times of crisis. The second President Bush reassured the nation after the attacks on 9/11. President Obama calmed Americans after the massacre at Sandy Hook Elementary School. 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. 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. Why not? Apparently because John Lewis protested Trump’s election and refused to attend his inauguration. But then, he had bad things to say about Senator John McCain, both before and after his death. By stark contrast, during the first presidential debate with Joe Biden, Trump was unwilling to condemn white nationalists.

76 See sources cited supra note 75.
78 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.79 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.80 While claiming that he was concerned about the fairness of the election, Trump sued various states, including Nevada, over their mail-in voter registration laws.81 Further, he threatened to reduce funding for the Post Office a few months before the election, creating a risk that mail-in ballots would not be counted.82 During his first debate with Joe Biden, Trump refused to agree that he would step down if he lost the election.83

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

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

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.90 His Republican critics shared one similarity: they announced their opposition to Trump’s

87 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.
90 See Knutson & Ayesh, supra note 2.
reelection.91 Some, notably John Bolton, found that Trump was “erratic and impulsive” and “unfit for office.”92

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

A group of conservatives who served under President George W. Bush formed “43 Alumni for Joe Biden.”95 It included at least 230 conservatives, primarily Republicans, who worked on Bush’s 2000 and 2004 campaigns.96 The group’s website indicated that they did not oppose the Republican Party.97 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.98

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

91 Id.
93 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).
94 See, e.g., STUART STEVENS, IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP 87, 201 (2020).
101 Id.
highlight our country’s story and values, and its people’s sacrifices and obligations.” The Lincoln Project also critiqued other Republicans for allowing, embracing, and defending the President and his actions. 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.

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. 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. He emphasized Trump’s “bigotry, incompetence and tax cuts for the wealthy.” He indicated special ire towards Trump and his family, whom he identified as manipulative, selfish, petty, and untrustworthy. Brooks saw Trump as “impulse-driven, ignorant, narcissistic and intellectually dishonest.”

George Will, yet another public intellectual, also announced his opposition to Trump. 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. His Washington Post op-ed’s headline said it all: “Trump Must be Removed. So Must His Congressional Enablers.” As was the case with Brooks, Will’s primary focus was on Trump, whom he called the “Crybaby-in-Chief.”

103 Id.
104 Id.
107 Id.
110 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.
111 See id.
112 Id.
113 Id.
Former Republican, now independent Max Boot was yet another Trump critic.114 Boot, who considers himself a Reagan conservative,115 had a successful career as a foreign policy advisor for Republicans such as John McCain, Mitt Romney, and Marco Rubio.116 Boot described Trump as “a liar, an ignoramus and a moral abomination.”117 Boot abandoned the Republican Party when Trump won the Republican nomination in the 2016 election.118 Boot argued that the Republican Party that he had once known and loved had failed him by endorsing Trump’s personality and policy positions.119

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

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

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


117 Linker, supra note 115.

118 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).


120 Linker, supra note 115; see also Beauchamp, supra note 116; Boot, supra note 119.

121 Boot, supra note 119.

122 Id.


124 Id.
and members of the government enabled Trump to abandon the Party’s core principles.\textsuperscript{125}

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

Think about the scorn with which Lindsay Graham and Ted Cruz treated Trump as a candidate.\textsuperscript{129} Despite that, they have signed onto many of his initiatives.\textsuperscript{130} 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.\textsuperscript{131}

Trump has flaunted some Republican priorities. His tariff wars have troubled many traditional free-trade Republicans, for example.\textsuperscript{132} His crass behavior has


\textsuperscript{127} Rothenberg, supra note 126.

\textsuperscript{128} Id.


bothered some supporters. At its core, though, much of the Trump agenda follows the recent Republican Party’s move to the far right. 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. The GOP, after all, is (was) the party of Abraham Lincoln. 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. 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. Some others joined Scott and McConnell.

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.

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

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134 Illing, supra note 126.


141 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. 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.” As Goldwater predicted, African Americans abandoned the Republican Party in 1964 and have never returned.

Richard Nixon’s appeal to the white working class during the 1968 presidential campaign is well documented. 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. 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.

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


142 STEVENS, supra note 94, at 13.
143 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)).
144 Id.
146 See McArdle, supra note 145.
147 Id.
remember, Neshoba County was where Klansmen killed three civil rights workers in 1964.\textsuperscript{151}

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

Like Nixon, Reagan did not use overtly racist language, relying instead on the increasingly common dog whistle. The most famous example is Reagan’s portrayal of 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?\textsuperscript{152}

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.\textsuperscript{153}

Back in the day, some prominent Republicans rejected racist appeals. Republican Governors George Romney and Nelson Rockefeller and Republican senators like Chuck Percy, Mark Hatfield, and Ed Brooke pushed back against the shift to the right in their party.\textsuperscript{154}

\textsuperscript{151} See Murder in Mississippi, PBS (June 2014), https://www.pbs.org/wgbh/americahistory/features/freedomsummer-murder/.


\textsuperscript{153} 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.

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

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

In context, Trump’s racism is overt. 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-113946 (Jan. 3, 2015, 10:07 PM) (explaining how, despite being a Republican, Brooke earned his reputation as a Senate liberal).


See id.

STEVENS, supra note 94, at 19.

Id. at 18–19.

Id. at 19.

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.\textsuperscript{165}

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

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

\textsuperscript{165} See Clark, supra note 140.


\textsuperscript{168} See id.

\textsuperscript{169} \textit{Infra} Part III.


\textsuperscript{173} See Robert Barnes, \textit{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
TRUMP’S LEGACY

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

Overseeing the federal judiciary’s hard turn to the right is hardly the only area in which Trump and the Republicans share policy preferences. American politics demonstrate many ironies. One is that Americans usually believe that Republicans are better managers of the American economy.¹⁷⁷ Despite that, Democrats have a much better track record than do Republicans with respect to the economy.¹⁷⁸ That track record is long-standing, whether measured by economic growth or the size of the deficit.¹⁷⁹ Dating back to Reagan’s presidency, Republicans have claimed that tax cuts are the remedy for almost any problem faced in the United States.¹⁸⁰

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

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¹⁷⁴ See *id.*
¹⁷⁶ Because of his concerns about the reputation of the Court, the Chief Justice has at times shown a willingness to defer advancing his agenda in favor of protecting the Court by adhering to precedent, or to decide cases like *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.
¹⁷⁹ See *id.*
2000, pushed through a tax cut, largely benefitting the wealthiest Americans.\(^\text{182}\) Amazingly, despite strong evidence to the contrary, Republicans have claimed that tax cuts pay for themselves.\(^\text{183}\) Trump’s “greatest” accomplishment was yet another massive tax cut for the wealthiest Americans.\(^\text{184}\) Remarkably silent were deficit hawks in the Republican Party.\(^\text{185}\)

The long-term effects of Trump’s tax cuts may include the need to cut safety net protections.\(^\text{186}\) Despite Trump’s promises to maintain Social Security, his tax policy may endanger such programs.\(^\text{187}\) Economists have expressed surprise that the increased deficit has not led to inflation.\(^\text{188}\) If it does, cutting government spending may be a necessary response.\(^\text{189}\) Not often discussed is the view of those on the far-right that bloating the deficit will force cuts to programs even as valued as are Social

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Security and Medicare.\textsuperscript{190} Notable far-right economic libertarians have long argued that such programs are immoral.\textsuperscript{191} As several recent books have demonstrated, the Koch brothers have played the long game, dating back to the 1950s, establishing right wing thinktanks designed to make their extreme views appear mainstream.\textsuperscript{192} While news reports suggested that the Koch brothers opposed Trump, as they surely did on tariffs,\textsuperscript{193} 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.\textsuperscript{194} 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.\textsuperscript{195}

There is more. What about climate change and environmental protection? Trump is a climate-change denier.\textsuperscript{196} For example, during Trump’s visit to California to assess fire damage, Governor Gavin Newsom pushed Trump to acknowledge climate change and its role in wildfires.\textsuperscript{197} Trump’s response was, “I don’t think science knows” what is happening.\textsuperscript{198} When Wade Crowfoot, California Secretary

\begin{footnotesize}
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\item[192] MACLEAN, supra note 191, at 133–40.
\item[195] See Alexander Hertel-Fernandez & Theda Skocpol, \textit{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.
\item[198] Peter Baker, Lisa Friedman & Thomas Kaplan, \textit{As Trump Again Rejects Science, Biden}
\end{itemize}
\end{footnotesize}
for Natural Resources, warned of continuing problems created by a warming planet, Trump shot back, “It’ll start getting cooler. You just watch.”199

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

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

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

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199 Id.
203 Id.
205 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).
For most of its history, the EPA has earned the support of nearly all Americans. 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. Importantly, the agency also appropriately weighed in on climate change.

A large percentage of Americans support the agency. 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. In the past decade, climate change has become a divisive political issue. 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.

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

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

See id.

See Meyer, supra note 204.

See id.


See Meyer, supra note 204 (noting that “a large majority of Americans tell pollsters that they approve of [the EPA]”).


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/fixedgov/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).

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).

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. Individuals like Charles and the late David Koch spent many millions of dollars to influence the Republican Party.

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

Trump’s environmental policy dovetails with the anti-science and anti-EPA drumbeat of the far-right. Some of those steps have included limiting EPA scientists from publishing their reports, curtailing gas mileage standards, changing

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

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

223 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).


228 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 CO2 emissions,\(^\text{229}\) and proposing substantial cuts to the agency’s budget.\(^\text{230}\)

While most Americans still believe that climate change is manmade and that environmental protection remains a priority, mainstream Republican members of Congress have demonstrated their willingness to flout science and to adhere to the extremist views of rightwing organizations.\(^\text{231}\) They had a strong ally in Trump.\(^\text{232}\)

Many of the Republicans who oppose Trump or who have abandoned the party believe in many of the positions that the party used to advance.\(^\text{233}\) As mentioned above, at one point, Republicans were environmentalists.\(^\text{234}\) Before Reagan was able to mobilize the religious right around overruling Roe, many Republicans favored abortion rights.\(^\text{235}\) 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.\(^\text{236}\) But their narrative that they left the party or opposed Trump because he


\(^{230}\) Webb et al., *supra* note 227, at 10,711.

\(^{231}\) 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).

\(^{232}\) See Shear & Davenport, *supra* note 196 (explaining how Trump and his environmental officials have “mocked, denied, or minimized” climate change).


\(^{234}\) See, e.g., *The Origins of EPA*, *supra* note 205 (explaining how Republican President Richard Nixon created the EPA).


was an aberration ignores many areas where Trump advanced policies that were part of the Republican agenda long before he was elected in 2016.237

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.238 By comparison, as when then-President Trump nominated Judge Neil Gorsuch to the Court, his supporters characterized him as “mainstream.”239 During the 2020 presidential election campaign, Trump and many Republicans tried to portray candidate Biden as under the influence of the extreme left-wing of the Democratic Party.240 Of course, Democrats have portrayed Republicans as moving far to the right of center.241

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

237 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).


240 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/trump-attacks-republican-convention/2020/08/24/43e5b46-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 Shadous’, 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.")

the left.\textsuperscript{242} For some centrists, that trope could give them a reason not to vote.\textsuperscript{243} 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.\textsuperscript{244} As Republicans tried to portray Democrats in the recent election cycle, a Democratic victory would usher in socialism.\textsuperscript{245} 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.\textsuperscript{246}

While some commentators argue that the United States no longer has a political center,\textsuperscript{247} 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.\textsuperscript{248}

True, while the Democratic Party includes a few members of Congress who espouse


\textsuperscript{243} 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”).


\textsuperscript{245} Id.

\textsuperscript{246} See generally MACLEAN, supra note 191; MAYER, supra note 218; KABASERVICE, supra note 241.


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

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.252 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.253 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.254

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.255 That stance has kept loyal single-issue voters whose

249 See Perry Bacon, Jr., The Six Wings of the Democratic Party, FIVE THIRTY EIGHT (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”).


251 See infra Part IV.

252 See supra Part I.


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

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


See Abortion Trends by Party Identification, supra note 259; Abortion, supra note 253.

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. He accused other justices of advancing the “homosexual agenda.” He claimed that his fellow justices were not representative of the views of Americans generally. 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. Even before Pope Francis announced support for recognition of same sex unions, 70% of Americans said that they supported same sex marriage.

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. 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.
Several writers have traced the Republican Party’s abandonment of environmental protection as a policy priority.272 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.273 That war has included a broader war on science.274

Here, like abortion, many Republicans now support the national platform position on climate change.275 Happily for the planet, many younger Republicans differ from their elders.276 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.277 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.278 Once again, the Democratic position on a major policy question has significant majority support.279 President Trump is not alone in defying those views.

272 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”).


275 REPUBLICAN PARTY PLATFORM, supra note 268, at 17–22.


277 Funk & Hefferon, supra note 215.

278 Id.

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.\textsuperscript{280}

Perhaps Trump’s signature “accomplishment” was the 2017 change to the tax laws.\textsuperscript{281} Trump slashed tax rates.\textsuperscript{282} Whatever else establishment Republicans say about their disapproval of Trump, they and he were on the same page when it came to cutting taxes.\textsuperscript{283} Indeed, for years, Republican politicians have claimed that tax cuts were the solution for virtually any problem that the United States faced.\textsuperscript{284} As Stuart Stevens, a former Republican campaign strategist, observed in his book, \textit{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.\textsuperscript{285} Extreme rightwing libertarians, including Charles Koch and many others on the far right, support massive tax cuts and the shrinking of the federal government.\textsuperscript{286}

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

\begin{footnotes}
\item[280] See Meyer, supra note 204.
\item[282] Peter Frintzilas, \textit{Economic Effects of the Tax Cuts and Jobs Act}, FORDHAM J. CORP. & FIN. L. BLOG (Dec. 19, 2019), https://news.law.fordham.edu/fjcf/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 Turkieka, \textit{(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.”).
\item[285] STEVENS, supra note 94, at 147; see also \textit{About the Pledge}, AMS. FOR TAX REFORM, https://www.atr.org/about-the-pledge/ (last visited June 2, 2022).
\item[286] See generally MAYER, supra note 218, at 4; ROBERT CHERNOMAS & IAN HUDSON, \textit{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).
\end{footnotes}
TRUMP’S LEGACY

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

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.294

287 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.”).
288 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).
289 Id. (reporting that, overall, only 37% of Americans approved of the TCJA).
293 Id.
294 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, an overwhelming percentage of Americans favor Democratic politicians’ proposals. Few Republican politicians join them. Instead, they have taken the extremist view of the National Rifle Association, which has become a piggy bank for many Republicans.

Writing for the New York Times, Sahil Chinoy provides another perspective on the political divide within the United States. 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.

According to data accumulated by the Manifesto Project, the Republican Party has allowed its extreme rightwing elements to dominate its party positions. 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.


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).

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


Chinoy, supra note 8.

Id.

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).

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.” 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. Obama’s market-driven healthcare reform was modeled on former Massachusetts Governor Mitt Romney’s Massachusetts plan. Obama’s efforts yielded virtually no Republican support. Some Republicans have claimed that the Affordable Care Act is a form of Leninist socialism.

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

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.313 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.314

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

311 See Jonathan Cohn, The ACA, Repeal, and the Politics of Backlash, HEALTH AFFS. (Mar. 6, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200305.771008/full/. At time of writing, the Republican Party has not put forward any successful alternative to the ACA.
313 MAYER, supra note 218, at 189, 194; see supra notes 224–225.
TRUMP’S LEGACY

2022]

push policies that were far to the right of popular sentiment. Some of those policies were rejected out of hand, like efforts to privatize Social Security. Like Trump, Bush claimed success in getting tax cuts passed. The primary beneficiaries were the wealthiest Americans. 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.” 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. They certainly did not favor the top-heavy nature of those cuts. 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.

These are hardly the only examples where Democratic policy positions are closer to the mainstream of America than are Republican policy positions. 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. 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. As political scientists...
Hacker and Pierson demonstrated in *Let Them Eat Tweets: How the Right Rules in An Age of Extreme Inequality*, the Republican Party is dominated by extreme rightwing plutocrats. 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. 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. Congressional Republicans’ willingness to abandon political norms has been part of that process. 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. 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.

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

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327 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).

328 See supra Part II.

329 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).

330 See supra Part II.

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


334 *The Filibuster That Almost Killed the Civil Rights Act*, NAT’L CONST. CTR. (Apr. 11,
TRUMP’S LEGACY

Filibruster 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.335

In exploring the move to the far right, this Part also considers the abandonment of another norm, the use of the “blue slip,” 336 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.337 As part of a long-standing strategy of the right, led by the Federalist Society, 338 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. 339 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.340

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

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Republican blockade.342 Then-Majority Leader Harry Reid led efforts to eliminate the filibuster for judicial nominees for district and appellate courts.343 By a simple majority vote, the Senate agreed to abandon the filibuster for lower courts, but not for the Supreme Court.344 Abandoning the filibuster for lower courts allowed Senate Democrats to secure approval of some of Obama’s nominees.345 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.346 The Senate has used the process for about a century, even though it is not written in the Rules of the Senate.347 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.348

Even though the rule is not in the Senate rules, during Obama’s term, the Senate continued to observe the tradition.349 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.350 Despite attempts to portray

342 Id.
343 Paul Kane, Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees, WASH. POST (Nov. 21, 2013), https://wapo.st/3PoQxyj.
344 Id.
347 See SOLLENBERGER, supra note 336, at 5.
349 Wheeler, supra note 346.
Obama as a leftist, by temperament and by policy positions, Obama was a centrist.\textsuperscript{351} His unsuccessful attempt to appoint highly respected moderate Judge Merrick Garland speaks volumes on that point.\textsuperscript{352} 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.\textsuperscript{353}

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.\textsuperscript{354} Even before the Republican-led Senate invoked the “nuclear option”\textsuperscript{355} to guarantee Neil Gorsuch’s appointment, Republicans were moving lower court nominees through the process with little observance to traditional restraints.\textsuperscript{356}

As discussed above, Trump and his Republican Party have abandoned norms at a prodigious rate.\textsuperscript{357} Since the beginning of Trump’s Presidency, two Senators have chaired the Senate Judiciary Committee.\textsuperscript{358} Senator Grassley, the first Chairman of the Judiciary Committee under the Trump Administration, allowed several

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\footnote{353}{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).
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\footnote{354}{See Savage, supra note 340.
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\footnote{357}{See Amy Siskind, This Is Not Normal, \textit{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 “[c]onstitutional experts in authoritarianism advise keeping a list of things changing, subtly, around you, so you’ll remember”).
}
\footnote{358}{Previous Committee Chairmen, \textit{SENATE COMM. JUDICIARY}, https://www.judiciary.senate.
}
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circuit court nominees to have hearings without the support of their home-state senators.\textsuperscript{359} Senator Graham followed Senator Grassley as Chair of the Judicial Committee and only selectively implemented the blue slip process.\textsuperscript{360} Chairman Graham held hearings for at least one circuit court nominee who received opposition from their home-state senators.\textsuperscript{361}

The threat of a filibuster could push the nominating president to appoint more centrist judges.\textsuperscript{362} 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.\textsuperscript{363}

McConnell, Trump, and leaders of the Federalist Society were proud of their accomplishment.\textsuperscript{364} The shape of the Trump judiciary is out of step with the rest of the nation.\textsuperscript{365} Most are white and “conservative,” according to a detailed report that appeared in the New York Times.\textsuperscript{366} In an interview with NPR, the Executive Vice...
President of Policy at the Leadership Conference on Civil and Human Rights called President Trump’s judicial appointees the “least diverse class of judicial nominees that we have seen in modern history.” 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. 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.” And, of course, Neil Gorsuch and Brett Kavanaugh would probably not be on the Court, but for the abandonment of the filibuster.

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

Trump appointees advocated for many of the Republican causes, again as urged above, 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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368 Id.

369 See Ruiz et al., supra note 332.

370 See id.

371 See generally Johnson, supra note 367.

372 Id.

373 Id.

374 Ruiz et al., supra, note 332.

375 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/.

376 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.\textsuperscript{377}

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

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

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\item[377] Ruiz et al., supra note 332.
\item[378] Id.
\item[379] Id.
\item[382] See Liptak, supra note 380.
\item[385] 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. Assoccs., 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.386 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.387

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

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.390 As developed below, the current structure of the federal judiciary creates a continuing risk to our democracy.391 This cadre of extreme rightwing judges and justices can rule in ways that protect the wealthy against most Americans.392

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.393 Given that most Americans
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. The Koch brothers, the Olin Foundation, the Bradley Foundation, and other extremely wealthy Republican donors have dictated the agenda. That agenda dates back to the 1950s. Charles Koch and others have funded organizations like the Federalist Society that has pushed rightwing judicial views. Indeed, the Federalist Society has endorsed almost all Trump appointees to the bench.

Beyond the judiciary, Koch and others on the right have funded think tanks. 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. Contemporary Republican tax policy, environmental policy, and hostility to agency regulations all reflect the views of the far right.

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.

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394 See generally Mayer, supra note 218; see generally MacLean, supra note 191.
395 Mayer, supra note 218, at 4, 93–94, 113, 118.
396 Id. at 93.
398 See Montgomery, supra note 364. The trend of nominating Federalist Society-aligned judges dates back to the Reagan Era. See id.
399 See Mayer, supra note 218, at 3.
400 Id. at 3–4.
401 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.”).
402 See id. at 18, 20–22 (characterizing EPA as a “regulatory juggernaut” in thrall to “environmental extremists” and stifling “progress”).
403 See id. at 27–28 (“Over-regulation is the quiet tyranny of the ‘Nanny State.’”).
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. 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. But there is more.

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


410 Justices 1789 to Present, SUP. CT. OF U.S., 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).

411 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.412 Corporate donations far exceed union contributions to political campaigns, in part, because union membership is on the decline.413 That decline, too, is part of the rightwing agenda, as reflected in the Court’s 5–4 decision in *Janus v. AFSCME*.414 *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.415 Uncertain is the extent of damage that *Janus* has caused unions, but anti-union hostility lurks close to the surface in such a decision.416 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.417

Even more important than allowing wealthy donors to dominate political debate by pouring millions of dollars into each election cycle418 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.419 Voter suppression in the United States, especially in the Jim Crow South, has an ugly, ugly history.420 For almost 50 years,


415 Id. at 2460.

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

417 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)).


419 *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.

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

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.\textsuperscript{425} Yet, somehow, during oral argument in \textit{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.\textsuperscript{426} 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.\textsuperscript{427}

Despite extensive hearings and findings by Congress in passing the 2006 Act, the Chief Justice disputed any need for the Act in \textit{Shelby County}.\textsuperscript{428} 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.\textsuperscript{429} The Chief Justice’s opinion made little effort to argue that the Court’s constitutional reading was part of the Framers’ original understanding.\textsuperscript{430} He referred to sovereignty, reflected

\textsuperscript{421} See generally \textit{Anderson}, supra note 420; \textit{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).


\textsuperscript{428} 570 U.S. at 547–50.

\textsuperscript{429} Id. at 535 (“There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”).

\textsuperscript{430} See id. at 543.
in the Tenth Amendment. But, of course, the Voting Rights Act was grounded in the Fifteenth Amendment, which by any ordinary understanding superseded or limited the Tenth Amendment.

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

Some commentators, like George Will, claimed that the law was outdated. 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.

As soon as the Court decided *Shelby County v. Holder*, Republicans ramped up extraordinary efforts to suppress the vote.

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\[431\] Id. at 542–45.
\[432\] See id. at 567–68 (Ginsburg, J., dissenting).
\[434\] *Shelby Cnty.*, 570 U.S. at 557–59 (Thomas, J., concurring).
\[435\] Id. at 558.
\[436\] See id. at 567–68 (Ginsburg, J., dissenting).
\[437\] Stout, supra note 422; Hulse, supra note 423.
states moved quickly to enact strict Voter ID laws, reduce or eliminate early voting processes, shut down polling places in minority communities, and aggressively purge voter rolls. These extreme voter-suppression efforts were, and still are, defended as supposedly necessary to combat purportedly-widespread voter fraud. The tactics also all disproportionately affect minority communities of color.

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


the rightwing of the Court rejected efforts to extend the deadline for mail-in ballots in Wisconsin.\footnote{Democratic Nat’l Comm. v. Wis. State Legis., 141 S. Ct. 28 (2020); see Stef W. Kight & Rebecca Falconer, \textit{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-8601cc7995a.html/.} (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.\footnote{E.g., E.J. Dionne Jr., \textit{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.}

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.\footnote{Robert Barnes, \textit{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/e78439a-1936-11eb-82db-60b15c874105_story.html.} It also let stand lower court rulings from North Carolina, also extending the deadline for counting votes.\footnote{Id.} 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.\footnote{Moore v. Circosta, 141 S. Ct. 46, 46–48 (2020).} Barrett refused to signal whether she would recuse herself, given her recent appointment by Trump, under questionable circumstances.\footnote{Barnes, supra note 450.}

rightwing lock on the Court—and over 200 recently-appointed lower court judges—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*. 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. That began an erosion of many Warren Court criminal procedure holdings.

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. Roosevelt proposed legislation that would increase the size of the Court to counterbalance its far-right leanings. 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.

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. Even then, short of legislation packing the Court, the current members of

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457 384 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 “dealing with criminals”); see also Fred P. Graham, *The Self-Inflicted Wound* 153–93 (1970).


459 COHEN, supra note 411, at 270–84; GRAETZ & GREENHOUSE, supra note 262, at 42–54.


461 *Id.* at 312–17.

462 *Id.* at 316–29.

463 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. Some commentators questioned whether Roberts was moderating his views. 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.

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. Neither idea is a shoo-in.

Perhaps the Court will overrule *Roe v. Wade*. That might lessen support among religious voters who oppose abortion but who are uncomfortable with other
Republican policies. For example, some Catholic voters have supported the Republican Party because of abortion, but voice concern about lack of support for families in need.\textsuperscript{470} Perhaps the Democratic Party will increase its majority in Congress. The 2022 Senatorial race seems to favor Democrats.\textsuperscript{471} 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.
