

# Court Expansion and the Restoration of Democracy: The Case for Constitutional Hardball

Aaron Belkin\*

## *Abstract*

*Neither electoral politics, norms preservation, nor modest good-government reform can restore the political system because they cannot mitigate the primary threat to the American democracy, Republican radicalism. Those who believe otherwise fail to appreciate how and why radicalism will continue to impede democratic restoration regardless of what happens at the ballot box, misdiagnose the underlying factors that produce and sustain GOP radicalism, and under-estimate the degree of democratic deterioration that has already taken place. Republicans do not need to prevail in every election to forestall the restoration of democracy or to prevent Democrats from governing.*

*The only viable path for restoring the United States political system requires Democrats to modify Senate rules that allow obstructionism, expand federal courts, and un-rig the political system. Unless Democrats enact all three parts of this agenda, democracy probably cannot be revived. Expanding the courts probably will be necessary to un-rig the system unless the current Supreme Court tolerates democratic revitalization, an unlikely prospect. To pass legislation to un-rig the system and expand the courts, however, Democrats will need to modify the Senate rules. Finally, if Democrats pursue modest good-government initiatives but forego aggressive reform, they will fail to un-rig the system. Thus, Democrats need to enact all three parts of the democracy agenda, not just one or two.*

*Legal experts fear that if Democrats play constitutional hardball, Republicans will respond in kind. Court expansion, for example, is expected to yield a race to the bottom that could destroy the*

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\* Aaron Belkin is Professor of Political Science at San Francisco State University and Director of Take Back the Court.

*independence of the judiciary and the rule of law more broadly. The argument fails to persuade, however, because the Supreme Court has become a plainly partisan institution, and because the GOP has already broken norms to steal the Court. Expansion is the only way to restore the Court, and re-balancing the Court is a necessary component of democratic restoration. If the GOP steals the Court again, the country will not be any worse off than today.*

*Given demographic trends, the 2020 election may be the Democrats' last opportunity in the foreseeable future to eke out a Senate majority while capturing the White House and retaining control of the House of Representatives. If they do so, and if they enact the proposed agenda quickly, democracy will be restored and the political playing field will be leveled. Otherwise, democracy will remain part of America's history, and not its future.*

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## I. DEMOCRACY IS ALREADY OVER

I am grateful for the opportunity to pen this response to Professor Bruce Ledewitz's article *A Call for America's Law Professors to Oppose Court Packing*<sup>1</sup> and advance the conversation about judicial reform with such a well-respected and accomplished expert. It is a pleasure and honor to engage in a dialogue with a distinguished legal scholar, one, who has spent his entire career in service to his profession, his colleagues, and his students. I wish to underscore, at the outset, that I agree with many of the key points he presented in his article. In particular, I embrace his argument that democracies can die when political parties decline to follow norms that enable political systems to function fairly and properly.<sup>2</sup>

Playwright Tony Kushner's masterpiece *Angels in America* premiered in 1991, but Kushner finished the script of Part I, *Millennium Approaches*, in 1988. In an astonishingly prescient scene from Part I, Martin—"a relentlessly upbeat official in the Reagan Administration Justice Department"—shares a table at a fancy New York restaurant with Roy Cohn as well as an Appeals Court clerk named Joe Martin declares:

They [Democrats] got back the Senate but we have the courts. By the nineties the Supreme Court will be block-solid Republican appointees, and the Federal bench—Republican judges like land mines everywhere, everywhere they turn. Affirmative action? Take it to court. Boom! Land mine. And we'll get our way on just about everything: abortion, defense, Central America, family values, a live investment climate . . . It's really the end of Liberalism. The end of New Deal Socialism.<sup>3</sup>

Kushner's prediction took two more decades than expected to come to fruition and required judicial theft that he did not anticipate. But as we think about what it means for democracy when courts are stolen, it is worth keeping in mind that the real test for Professor Ledewitz and for GOP leaders is not whether they urge political leaders to refrain from expanding the Supreme Court and lower federal courts at this time. It is what they did and said as the GOP orchestrated a fifty-year campaign to gut the Voting Rights Act,<sup>4</sup> when the GOP-led Senate essentially declined to allow President Obama to fill lower court vacancies throughout most of his presidency,<sup>5</sup> when, for the first

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1. See Bruce Ledewitz, *A Call for America's Law Professors to Oppose Court Packing*, 2019 PEPP. L. REV. 1 (2019).

2. *Id.* at 5–8.

3. TONY KUSHNER, *ANGELS IN AMERICA, A GAY FANTASIA ON NATIONAL THEMES, PART I: MILLENNIUM APPROACHES* 63 (1991) (emphasis added).

4. See Jim Rutenberg, *A Dream Undone: Inside the 50-year campaign to roll back the Voting Rights Act*, N.Y. TIMES MAG. (July 29, 2015), <https://www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html>.

5. See David G. Savage, *This Congress filled the fewest judgeships since 1952. That leaves a big*

time in modern American history, the GOP would not let a sitting president fill a Supreme Court vacancy,<sup>6</sup> when a critical mass of GOP leaders declared that if Hillary Clinton were to become president, they would prevent her from filling that vacancy throughout her entire term,<sup>7</sup> and as the GOP destroyed most of democracy's foundational norms. Given that, for the most part, GOP leaders stood by silently or actively participated in the destruction of democracy's normative foundation, it is too late for them to call on Democrats to refrain from doing what it takes to restore the integrity of the political system.

Professor Ledewitz warns that democracies can die if norms deteriorate. But I would respectfully submit that American democracy has already effectively died because the Republican Party has burned most of our normative house to the ground. The United States will continue to refer to itself as a constitutional democracy and to hold elections, and Democrats will occasionally win those elections, to be sure. But here is the three-part catch: (1) As a partial result of gerrymandering, voter suppression, and dark money, Democrats require landslides to prevail in federal elections; (2) Even when Democrats do prevail in federal elections, unprecedented GOP obstruction prevents them from getting much done; (3) Even if and when Democrats do manage to enact a handful of important regulations and laws, the stolen Supreme Court will curtail or overturn most of them.

When, thanks in no small measure to the opposition's anti-democratic practices, a political party requires (far) more than fifty percent to prevail in elections, when that party is effectively prevented from governing even when it does prevail at the ballot box, and when that party's few accomplishments are curtailed by a stolen court, that is not democracy. That is single-party rule. The United States finds itself in this predicament today. And this is the predicament that Professor Ledewitz would freeze in place by urging Democrats, but only Democrats (and not the GOP) to comply with norms that enable democracy to function.

In an important new study, Professor Thomas M. Keck notes the importance of "distinguish[ing] between constitutional hardball in service of democratic erosion and constitutional hardball in service of democratic preservation or renewal," a contrast that underscores why, at this point, the

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*opening for Trump*, L.A. TIMES (Dec. 31, 2016), <https://www.latimes.com/politics/la-na-judges-trump-senate-20161231-story.html>.

6. See, e.g., JoLissa Jones, *Merrick Garland and the Stalemate Senate: Does the Senate Owe Nominees a Vote?*, 42 T. MARSHALL L. REV. ONLINE 6 (2018).

7. See Nina Totenberg, *If Clinton Wins, Republicans Suggest Shrinking Size of Supreme Court*, NPR (Nov. 3, 2016), <https://www.npr.org/2016/11/03/500560120/senate-republicans-could-block-potential-clinton-supreme-court-nominees> (quoting former Sen. John McCain (R-AZ), who stated in 2016 that, if Clinton was elected: "I promise you that we will be united against any Supreme Court nominee [that] she would put up.").

only viable path to restoring democracy requires Democrats to play constitutional hardball by enacting a three-part democracy agenda.<sup>8</sup> If Democrats retake the White House and Senate in 2020, while retaining control over the House of Representatives, they should modify Senate rules, expand federal courts, and un-rig democracy.<sup>9</sup> Unless Democrats enact all three parts of this agenda, democracy probably cannot be revived. Expanding the courts probably will be necessary to un-rig the system unless the Supreme Court tolerates democratic restoration, an unlikely prospect. To pass legislation to un-rig the system and expand the courts, however, Democrats will need to modify Senate rules. Finally, if Democrats pursue modest good-government reforms but forego aggressive un-rigging, they will fail to undo decades of anti-democratic practices and hence will fail to level the playing field. Thus, Democrats need to enact all three parts of the democracy agenda, not just one or two. Further, contrary to Professor Ledewitz's recommendation that law professors should oppose court expansion, I would suggest that they should vigorously support the three-part democracy agenda. This article elaborates on the case for the democracy agenda and includes an explanation of why electoral defeats will not de-radicalize the GOP and why passage of the democracy agenda will facilitate the restoration of the political system.

## II. MAPPING REPUBLICAN RADICALISM

The case for court expansion is not entirely about the courts. It is, rather, about the staggering threat that Republican radicalism poses to the American public and, due to climate change, humanity's survival.<sup>10</sup> It seems that Republican radicalism<sup>11</sup> is implicated in persistent and successful efforts to

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8. See Thomas M. Keck, *Court-Expansion and Democratic Erosion* 1 (Working Paper, Nov. 3, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3476889](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476889); see also Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (explaining that "constitutional hardball" involves "practitioners [who] see themselves as playing for keeps in a special kind of way; they believe the stakes of the political controversy their actions provoke are quite high, and that their defeat and their opponents' victory would be a serious, perhaps permanent setback to the political positions they hold"). For helpful refinements of the term "constitutional hardball," see JACK M. BALKIN, *CONSTITUTIONAL HARDBALL AND CONSTITUTIONAL CRISES* 579-98 (Yale L. Sch. Fac. Scholarship Series 2008) and Joseph Fishkin and David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920-26 (2018). Fishkin and Pozen's conceptualization of constitutional hardball is especially informative, describing it as maneuvers that violate or strain unwritten norms of government practice—norms of good institutional citizenship that sustain the constitutional system—for partisan ends. *Id.* This is distinguished from modest good-government reform—banning voter suppression and curtailing dark money—included in the House Democrats' first bill from more aggressive hardball approaches such as offering statehood to Washington DC and Puerto Rico. *Id.*

9. Crooked Media editor Brian Beutler called for a similar proposal. See Brian Beutler, *Don't Despair over the Supreme Court—Get Mad, Then Even*, CROOKED (July 9, 2018), <https://crooked.com/articles/trump-supreme-court-despair/>; see generally DAVID FARIS, *IT'S TIME TO FIGHT DIRTY* (2018) (discussing strategies for American institutional reform).

10. See Michael Le Page, *Destruction of nature is as big a threat to humanity as climate change*, NEWSIDENTIST (May 6, 2019), <https://www.newscientist.com/article/2201697-destruction-of-nature-is-as-big-a-threat-to-humanity-as-climate-change/>.

11. As noted above, Professor Thomas M. Keck underscores the importance of distinguishing

exacerbate economic inequality,<sup>12</sup> undermine access to health care,<sup>13</sup> deny millions of Black, Latino, and Asian Americans the right to vote,<sup>14</sup> dismantle unions,<sup>15</sup> deport undocumented tax-payers,<sup>16</sup> block meaningful action on climate change,<sup>17</sup> and more. How to conceptualize Republican radicalism may not be straightforward or apparent, and the social science literature on political parties does not offer much help.<sup>18</sup> Here, I suggest that Republican radicalism should be understood as a deep-seated commitment among GOP leaders and voters to four principles: (a) willful ignorance; (b) scapegoating; (c) prioritizing party over national interest to an extreme degree; and (d) anti-democratic practices.

All four elements of Republican radicalism pre-date President Trump's political ascent by at least a generation. Well before his arrival on the political scene, even the most moderate, mild-mannered, and reasonable Republicans such as Senator Susan Collins (R-ME), former Ohio governor John Kasich, and former Justice Anthony Kennedy tended to govern as radicals, despite

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between democracy-eroding and democracy-enhancing hardball. See Keck, *supra* note 8. Professor Mark Tushnet, however, argues that “conventions erosion has been accompanied by a configuration of partisan politics that makes it difficult to present a discussion of that erosion in a way that will not itself seem partisan.” See Mark Tushnet, *The Pirate’s Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481, 481 (2018); see also Fishkin & Pozen, *supra* note 8, at 927–29.

12. See Dylan Scott & Alvin Chang, *The Republican tax bill will exacerbate income inequality in America*, VOX (Dec. 4, 2017, 11:05 AM), <https://www.vox.com/policy-and-politics/2017/12/2/16720952/senate-tax-bill-inequality> (quoting New York University professor and economist Lily Batchelder: “The bill is investing heavily in the wealthy and their children . . . by boosting their stock portfolios, creating new loopholes for them to avoid tax on their labor income, and by cutting taxes on massive inheritances.”).

13. See David J. Brown, *Obamacare v. Trumpcare: Challenging the Partisan Politics Sabotaging U.S. Healthcare Reform*, 40 U. LA VERNE L. REV. 31, 39–40 (2018) (noting that the American Health Care Act of 2017, the Republicans’ measure to repeal the Democrats’ 2008 Affordable Care Act, would “result in a total of 51 million people being uninsured within the decade—compared with the estimated 28 million under the ACA.”).

14. See L. Darnell Weeden, *Equal Voting Rights Require Removing Race and Partisan Discrimination From Elections and Legislative Gerrymandering*, 79 LA. L. REV. 781, 784–85 (2019). See also Daniel P. Tokaji, *Vote Dissociation*, 127 YALE L. J. F. 761, 766 (2018).

15. See Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L. J. 400, 402–03 (2015) (explaining how Republican officeholders have enacted “restrictive labor legislation for the purpose of weakening unions”).

16. See, e.g., Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 303 (2018).

17. See Alexandra Hutzler, *Donald Trump and Republicans Continue Efforts to Curb Climate Change Action—At Home and Abroad*, NEWSWEEK (May 2, 2019, 4:23 PM), <https://www.newsweek.com/donald-trump-republicans-climate-change-1413345>.

18. Numerous studies characterize GOP extremism primarily in ideological terms, thus overlooking much of what is interesting and important about radicalism. See MATT GROSSMANN & DAVID A. HOPKINS, *ASYMMETRY OF AMERICAN PARTY POLITICS* (2016); Yphtach Lelkes & Paul M. Sniderman, *The Ideological Asymmetry of the American Party System*, 46 BRIT. J. OF POL. SCI. 825 (2016).

their pleasant demeanors.<sup>19</sup> Even though these and other so-called moderate Republicans are stylistically less frothy than the President—and without discounting Trump’s reactivity or its dangers—they usually govern as radically as their crasser colleagues.

#### A. *Willful Ignorance*

Arguably, the first element of Republican radicalism is a deep-seated commitment to willful ignorance, which can also be referred to as intentional blindness. Willful ignorance and intentional blindness are purposely not seeing and not understanding, and GOP politics have seemingly been organized around an unwillingness to engage with facts for quite some time, well before President Trump’s ascent.<sup>20</sup> As Representative Mark Meadows (R-N.C.) stated recently, “I think what happens is, when we start to look at the facts, everybody has their impression of what the truth is.”<sup>21</sup> Republicans’ distorted relationship with fact is evident when GOP leaders lie, gas-light, ignore data, and sabotage evidence-based approaches to policy making, and when Republican voters entertain demonstrably false beliefs.

Willful ignorance is stitched into the fabric of Republican culture because neither wing of the GOP—capital (corporations and elites) or resentment (white supremacists, xenophobes, sexists, homophobes, and gun enthusiasts)—supports policies that the public endorses.<sup>22</sup> Republicans are often dishonest with themselves and the public to garner popular support. For example, consider President George W. Bush naming what amounted to a giveaway to coal companies “The Clear Skies Initiative.”<sup>23</sup> GOP policies could

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19. See Eric Levitz, *Yes, Normal Republican Elites Are a Threat to Democracy*, N.Y. MAG. (July 15, 2018), <http://nymag.com/intelligencer/2018/07/yes-normal-republican-elites-are-a-threat-to-democracy.html>; Joanna Walters, *John Kasich has been billed as moderate candidate, but his record is anything but*, THE GUARDIAN (Feb. 11, 2016), <https://www.theguardian.com/us-news/2016/feb/11/john-kasich-ohio-moderate-voting-record-republican-president-campaign>. For example, Collins votes in favor President Trump’s position 78.5 percent of the time. See *Tracking Congress in the Age of Trump*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/congress-trump-score/> (last visited Sept. 25, 2019).

20. See, e.g., Carl J. Peterson, *The Trump Years: Politically Driven Willful Ignorance*, MEDIUM (Mar. 15, 2019), <https://medium.com/@ChangeTheLAUSD/the-trump-years-politically-driven-willful-ignorance-c69e87b03ece>; Paul Krugman, *A Party Defined by Its Lies*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/opinion/republican-party-lies.html>. Additionally, today President Trump is frequently dishonest. See *All False statements involving Donald Trump*, POLITIFACT, <https://www.politifact.com/personalities/donald-trump/statements/byruling/false/> (last visited Oct. 26, 2019).

21. See James Hohmann, *The Daily 202: How Adam Schiff Avoided A Circus*, WASH. POST (Nov. 14, 2019), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2019/11/14/daily-202-how-adam-schiff-avoided-a-circus/5dccc95888e0fa10ffd20e41/>.

22. For a list of Republican party positions that popular majorities oppose, see Peter Dreier, *Most Americans Are Liberal, Even If They Don’t Know It*, THE AM. PROSPECT (Nov. 10, 2017), <https://prospect.org/power/americans-liberal-even-know/>.

23. See Environmental News Service, *USA: Republican “Clear Skies” Toxic to Democrats*, CORPWATCH (Feb. 28, 2003), <https://corpwatch.org/article/usa-republican-clear-skies-toxic-democrats>.

not be sustained by a culture of honest engagement with fact, and willful ignorance can thus be understood as both a consequence and a cause of Republicans' need to mask what they stand for.

Willful ignorance is a dangerous basis for a political movement if threats are understood in distorted terms. It seems, from the point of view of many Republicans, that a caravan of women and children hundreds of miles from the American border poses a significant threat to the nation, but climate change does not pose a threat; that single-payer health care poses a threat to the public's well-being because government "death panels" would determine sick peoples' fate, but public interest is not compromised when thirty million citizens lack health insurance and millions more are under-insured; that voter fraud, which barely exists in the United States, poses a threat to the electoral system, while denying millions of minorities the right to vote does not threaten democracy; and so on. Some GOP willful ignorance may reflect a conscious and perhaps cynical refusal to see fact, while in other cases, Republican leaders and voters seem unable to distinguish truth from fiction.<sup>24</sup>

### B. Scapegoating

The second element of Republican radicalism is a deeply entrenched commitment to scapegoating, which can also be referred to as the politics of resentment.<sup>25</sup> I observed above that the Republican party consists of an alliance between capital and resentment. For more than a generation, GOP politics have almost always involved scapegoating and the inflation and distortion of non-existent or minor threats, sometimes explicitly and other times implicitly via "dog-whistle" appeals.<sup>26</sup>

The GOP's reliance on scapegoating is, arguably, about the power of capital. The capital wing of the Republican Party (donors like the Koch brothers and politicians like former Speaker of the House Paul Ryan) cannot appeal to voters on the basis of deregulation and tax cuts for the rich.<sup>27</sup> So, the capital wing manufactures resentment to drive GOP turnout. This was just as true of Nixon's Southern strategy, and of Ronald Reagan's declaration that "I believe in states' rights" at a Mississippi event held near where three civil rights

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24. For a survey of explanations as to why Republicans entertain demonstrably false beliefs, see CHRIS MOONEY, *THE REPUBLICAN BRAIN: THE SCIENCE OF WHY THEY DENY SCIENCE—AND REALITY* (2012).

25. *See generally* RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS* (1965) (explaining that the politics of paranoia have infected liberal and conservative political movements throughout U.S. history, but this article argues that for the past generation, the politics of resentment have been most closely associated with the American right).

26. *See, e.g.*, KEVIN PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1969).

27. Dreier, *supra* note 22.

workers had been murdered, as recent efforts to inflate the threat posed by MS-13 and a caravan of migrants.<sup>28</sup> The *New York Times* video, “Unfiltered Voices from Donald Trump’s Crowds,” provides recent illustrations of moments when capital manufactured resentment and GOP voters consumed it.<sup>29</sup>

Part of what is so striking and effective about the production and consumption of resentment is that Republican voters do not seem to care much about which particular outgroup is designated as the primary target of demonization at any particular moment. Demonization and the infliction of pain seem to be ends for their own sake.<sup>30</sup> The bullseye shifts around, with leaders emphasizing immigrant gang members in some eras, and gay pedophiles, transgender people in the bathroom, feminist women, and/or Muslim terrorists in others, plus the constant through-line of Black crime.<sup>31</sup> Then, when one group of scapegoats achieves some measure of tolerance, or when Republican leaders decide for whatever reason to stop demonizing a particular group, they simply re-direct their voters’ resentment to other outcasts.<sup>32</sup>

Manufacturing resentment works in the sense that it motivates GOP voters to go to the polls even though those voters do not care about, and often oppose, corporate deregulation and tax cuts for the rich.<sup>33</sup> Inciting resentment is so compelling that GOP voters continue to elect representatives who advance the interests of corporations and the one percent as long as those representatives endorse policies that symbolically demonize and tangibly injure the targets of scapegoating.<sup>34</sup> Counterfactually, even if all feminists,

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28. Bob Herbert, *Righting Reagan’s Wrongs*, N.Y. TIMES (Nov. 13, 2007), <https://www.nytimes.com/2007/11/13/opinion/13herbert.html>.

29. See Erica Berenstein, Nick Corasaniti, & Ashley Parker, *Unfiltered Voices From Donald Trump’s Crowds*, N.Y. TIMES VIDEO (Aug. 3, 2016), <https://www.nytimes.com/video/us/politics/100000004533191/unfiltered-voices-from-donald-trumps-crowds.html>.

30. See TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM; RUSSIA, EUROPE, AMERICA* 272–73 (2018) (discussing sadopopulism).

31. See MICHAEL ERIC DYSON, *TEARS WE CANNOT STOP: A SERMON TO WHITE AMERICA* 149–50 (2017); Ta-Nehisi Coates, *The First White President*, THE ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/>.

32. For example, notice the decline in explicit GOP appeals to homophobia between the 2004 presidential campaign, when Karl Rove organized Bush’s campaign around opposition to marriage equality, and in 2016, when now-President Donald Trump pledged—inaccurately, it turns out—to support LGBT rights, and the simultaneous expansion of xenophobic appeals over the same period. See, e.g., Michelangelo Signorile, *Trump has a devastating record on LGBTQ rights. Don’t deny the truth.*, WASH. POST (Aug. 20, 2019), [https://www.washingtonpost.com/opinions/trump-may-want-you-to-think-hes-lgbtq-friendly-dont-be-fooled/2019/08/20/c2b7a7be-c36b-11e9-b72f-b31dfaa77212\\_story.html](https://www.washingtonpost.com/opinions/trump-may-want-you-to-think-hes-lgbtq-friendly-dont-be-fooled/2019/08/20/c2b7a7be-c36b-11e9-b72f-b31dfaa77212_story.html). Additionally, GOP leaders spent decades exaggerating the Soviet and then the Russian threat, and GOP voters were receptive to threat inflation. Then, as deflecting away from Russian interference in the 2016 election became an important GOP priority, favorable impressions of Russia among Republican voters increased dramatically. See Jacob Poushter, *6 Charts on How Russians and Americans See Each Other*, PEW RES. CTR. (Oct. 4, 2018), <https://www.pewresearch.org/fact-tank/2018/10/04/6-charts-on-how-russians-and-americans-see-each-other/>.

33. Dreier, *supra* note 22.

34. In 2005, Thomas Frank made a parallel argument about cultural resentment, but discounted racial animus as a motivating factor for GOP voters. See THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA* 1-10 (2005). While Frank

undocumented immigrants, Muslims, black people, transgender people, and gays and lesbians permanently left the United States, capitalists would probably manufacture resentment about other phony targets, and GOP voters would probably go to the polls to ratify the punishment of the new outcasts.<sup>35</sup>

Even though mild-mannered moderates like Paul Ryan might not refer to Mexicans as rapists, Ryan's super-PAC has provided funding for political advertisements that gin up hysteria about immigrants.<sup>36</sup> Reasonable people like Susan Collins may work to protect transgender service members, but she supported Supreme Court Justices who disabled the Voting Rights Act.<sup>37</sup> And even though Anthony Kennedy played a historic role in shielding gay and lesbian Americans from GOP scapegoating, he endorsed a line of Supreme Court jurisprudence that enables the hyper-incarceration of racial minorities, and he voted to uphold President Trump's Muslim ban.<sup>38</sup> Regardless of these GOP moderates' motivations, they endorse policies that incite resentment and they enable, benefit from, and rarely speak out against dog-whistle or explicit scapegoating among their colleagues.<sup>39</sup>

### C. *Prioritizing Party Over National Interest to an Extreme Degree*

The third element of Republican radicalism is prioritizing party over national interest to an extreme degree, for example when the Gingrich Congress shut down the government in 1995 and 1996 to block funding for health care, education and the environment.<sup>40</sup> Even at the height of the Great Recession,

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makes a passing reference to a "landscape of distortion, of paranoia, and of good people led astray," his terminology differs from mine in that he refers to the *repackaging of class as cultural resentment* whereas my focus is the *manufacture of resentment*. Frank's elision of race illustrates why resentment is a more useful frame than cultural resentment for understanding the capital wing's bait-and-switch. Race did not emerge as an explicit theme in Frank's interviews because GOP leaders' focus at the time was whipping up resentment about gays, lesbians and terrorists, while racial resentment could be incited in the coded language of gun ownership. Thus, Frank's interviewees did not seem racist. Once Barack Obama became President, the GOP's capital wing returned to the old strategy of manufacturing racial resentment in more explicit terms.

35. On counterfactual inference, see PHILIP E. TETLOCK & AARON BELKIN, COUNTERFACTUAL THOUGHT EXPERIMENTS IN WORLD POLITICS: LOGICAL, METHODOLOGICAL AND PSYCHOLOGICAL PERSPECTIVES (1996).

36. See *Latest Examples of the GOP Immigration Attack Ads*, AM. VOICE (Oct. 16, 2018), [https://americasvoice.org/press\\_releases/latest-examples-of-the-gop-immigration-attack-ads/](https://americasvoice.org/press_releases/latest-examples-of-the-gop-immigration-attack-ads/).

37. See Rutenberg, *supra* note 4; Philip Bump, *How every sitting senator has voted on every Supreme Court nomination they've seen*, WASH. POST (Oct. 5, 2018), <https://www.washingtonpost.com/politics/2018/10/05/how-every-sitting-senator-has-voted-every-supreme-court-nomination-theyve-seen/>.

38. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

39. See David Jacobs & Daniel Tope, *The Politics of Resentment in the Post-Civil Rights Era: Minority Threat, Homicide, and Ideological Voting in Congress*, 112 AM. J. SOC. 1458-94 (2007).

40. See McKay Coppins, *The Man Who Broke Politics*, THE ATLANTIC (Nov. 2018),

Senator Mitch McConnell acknowledged that his top goal was not repairing the economy, but obstructing the President.<sup>41</sup>

Arguably, the GOP's commitment to harmful policies reflects a persistent prioritization of party over national interest. The party's support for cutting taxes on the wealthy may reflect its dependence on donor contributions more than its ostensible belief that fiscal responsibility strengthens the economy.<sup>42</sup> Its opposition to a ban on semi-automatic weapons may reflect the power of the NRA, a gun industry lobby.<sup>43</sup> Its refusal to allow progress on climate change may reflect the sway of the oil, gas, and coal industries.<sup>44</sup> Republican governors who refuse to allow their states to participate in Medicaid expansion score a political point, but their position does not seem to make sense from the point of view of policy or the well-being of their states.<sup>45</sup> Russian meddling in U.S. elections seems to pose a clear danger, yet Republicans have fought efforts to mitigate that danger.<sup>46</sup> Every political party seeks to expand its power, but the GOP tends to prioritize party over national interest to an extreme degree.

#### D. Anti-Democratic Practices

The fourth and final element of Republican radicalism is a deep-seated commitment to anti-democratic practices, including voter suppression, obstructionism, judicial theft, gerrymandering, and dark money in politics.<sup>47</sup>

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<https://www.theatlantic.com/magazine/archive/2018/11/newt-gingrich-says-youre-welcome/570832/>. However, both parties have orchestrated government shutdowns as a political tactic. See Jed Handelsman Shugerman, *Hardball vs. Beanball: Identifying Fundamentally Antidemocratic Tactics*, 119 COLUM. L. REV. ONLINE 85 (2019).

41. FARIS, *supra* note 9, at 20. Senator McConnell knew that any legislation President Obama passed would be a political win for the administration, so he used the filibuster and government shutdowns to block even the most common-sense solutions to pressing problems. See Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis Over Shutdown and Debt Limit*, N.Y. TIMES (Oct. 16, 2013), <https://www.nytimes.com/2013/10/17/us/congress-budget-debate.html> (highlighting when the Republican House majority threatened to not extend the debt ceiling to pressure the Obama administration to cut spending, knowing that failure to extend the ceiling could increase the cost of borrowing and destabilize the economy).

42. Bryce Covert, *Republicans Learn to Love Debt*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/opinion/republicans-debt-ceiling-budget.html>.

43. See Center for Responsive Politics, *National Rifle Ass'n, Money to congressional candidates: 2018 cycle*, OPENSECRETS, <https://www.opensecrets.org/orgs/summary.php?id=d000000082> (last visited Oct. 26, 2019).

44. See Center for Responsive Politics, *Oil & Gas: Top Contributors, 2017-2018*, OPENSECRETS, <https://www.opensecrets.org/industries/indus.php?cycle=2018&ind=E01> (last visited Oct. 26, 2019); Center for Responsive Politics, *Coal Mining: Top Contributors, 2017-2018*, OPENSECRETS, <https://www.opensecrets.org/industries/indus.php?cycle=2018&ind=E1210> (last visited Oct. 26, 2019).

45. Roy Grant, *The Triumph of Politics Over Public Health: States Opting Out of Medicaid Expansion*, 104 AM. J. OF PUB. HEALTH 203 (2014).

46. Ted Barrett & Kevin Collier, *GOP senators block election security legislation hours after Mueller warns of Russian interference*, CNN (July 25, 2019), <https://edition.cnn.com/2019/07/25/politics/republican-senators-block-election-security-legislation/index.html>.

47. My conceptualization of GOP anti-democratic practices overlaps closely with Fishkin and

### 1. Voter Suppression

Republicans orchestrated a successful, fifty-year campaign to roll back the Voting Rights Act, culminating in the Supreme Court's 2013 decision to invalidate one of the Act's key provisions.<sup>48</sup> Republican efforts to disenfranchise racial minority voters are complex and multi-faceted, and include racially biased election laws, purging of voter rolls, roadblocks to polling and ballot access, fabricated voter fraud claims, and more.<sup>49</sup> And, research shows that voter suppression works.<sup>50</sup>

### 2. Obstructionism

During the Obama presidency, Republicans leveraged Senate procedures to block popular and much needed legislation and to prevent President Obama from making executive branch appointments.<sup>51</sup> Between 1917 and 1959, there was, on average, only one filibuster per congressional term. During the first six years of Senator McConnell's tenure as Minority Leader, Republicans used the filibuster 420 times.<sup>52</sup>

### 3. Judicial Theft

In 2016, the GOP's refused to consider Merrick Garland, Obama's nominee to fill an open seat on the Supreme Court, an arguably unprecedented maneuver.<sup>53</sup> Ostensibly moderate GOP Senators said that if Hillary Clinton were elected, they would not allow her to fill the seat.<sup>54</sup> The GOP also blocked district and circuit court judgeships by leveraging Senate procedures to scuttle dozens of Obama's lower court nominations.<sup>55</sup>

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Pozen's definition of asymmetric constitutional hardball. See Fishkin & Pozen, *supra* note 8, at 930–33.

48. See Rutenberg, *supra* note 4.

49. For a comprehensive history, see CAROL ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* (2018).

50. According to one recent study, voter ID laws “serve not only to diminish minority participation but also to increase the gap in the participation rate between whites and nonwhites.” Zoltan Hajnal, Nazita Lajevardi, & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 369 (2017).

51. FARIS, *supra* note 9, at 21–25.

52. See MIMI MARZIANI, JONATHAN BACKER, & DIANA KASDAN, *CURBING FILIBUSTER ABUSE* (2012); MIMI MARZIANI, *FILIBUSTER ABUSE* 4 (2010).

53. See Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 131 (2017) (discussing that “every claim of unprecedentedness rests on a particular way of telling the story of what came before.”).

54. Mary Clare Jalonick, *If Clinton wins, more in GOP say no to full Supreme Court*, PBS (Nov. 1, 2016), <https://www.pbs.org/newshour/politics/clinton-wins-gop-say-no-9-supreme-court>.

55. Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG.

#### 4. Gerrymandering

Republicans have drawn Congressional districts so as to hinder Democratic candidates' ability to prevail in general elections. Prior to the recent midterm elections, scholars and experts accurately estimated that Democrats would need to win the national popular vote by between 6 and 11 percent to take control of the House of Representatives.<sup>56</sup>

#### 5. Dark Money

A small network of billionaires and corporations has, often in secret, bankrolled the far right's infrastructure, including grassroots groups, political campaigns, academic and policy networks, and a propaganda machine.<sup>57</sup> Both parties receive contributions from wealthy donors, but Republicans arguably use dark money to fund institutes, advertisements, and media outlets that mislead the public and to subsidize phony citizens groups that masquerade as grassroots organizations.

Holistically, the distinct elements of GOP radicalism sustain and amplify one another, and radicalism's durability is a partial function of that mutual interdependence. To take one of many examples of interconnectedness, dark money contributes to electoral victories that enable GOP officials to engage in extreme gerrymandering and voter suppression. Then, courts that Republicans control as a result of theft or obstructionism expand opportunities for more dirty tricks.<sup>58</sup> The alliance between capital and resentment is powerful,

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(Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html>.

56. See, e.g., Laura Royden, Michel Li, & Yuriy Rudensky, *Extreme Gerrymandering & the 2018 Midterm* BRENNAN CTR. (Mar. 23, 2018), <https://www.brennancenter.org/publication/extreme-gerrymandering-2018-midterm>; see also Amber Phillips, *Just How Big of a Hurdle Is Gerrymandering to Democrats' Taking Back the House This November*, WASH. POST (March 31, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/03/31/just-how-big-of-a-hurdle-is-gerrymandering-to-democrats-taking-back-the-house-this-november/>. In the 2016 election, the Democratic and Republican popular vote totals for the House of Representatives were close, with Republicans winning 49.1 percent of the popular vote as compared to 48 percent for the Democrats. Thanks in large part to extreme gerrymandering, Democrats won just 194 House races as compared to 241 for the Republicans. See David A. Lieb, *AP analysis shows how gerrymandering benefited GOP in 2016*, DENV. POST (June 25, 2017), <https://www.denverpost.com/2017/06/25/gerrymandering-2016-election/>.

57. JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016). In 2015, the *New York Times* reported that, "Just 130 or so families and their businesses provided more than half the money raised through June by Republican candidates and their super PACs." Nicholas Confessor, Sarah Cohen, & Karen Yourish, *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES (Aug. 1, 2015), <https://www.nytimes.com/2015/08/02/us/small-pool-of-rich-donors-dominates-election-giving.html>. According to the Center for Responsive Politics, donors from the wealthiest .01 percent of the population contributed \$2.3 billion, or 35 percent of all spending during the 2016 election. Niv M. Sultan, *Election 2016: Trump's Free Media Helped Keep Cost Down, but Few Donors Provided More of the Cash*, OPENSECRETS (Apr. 13, 2017), <https://www.opensecrets.org/news/2017/04/election-2016-trump-fewer-donors-provided-more-of-the-cash/>.

58. Simultaneously, conservative media outlets like Fox and Breitbart hold the system together by

and while President Trump will not be President forever, his voters, donors, and media allies are not going away.

Do Democrats engage in the same dirty tricks as Republicans? My father, an intelligent man who has worked as an attorney for over fifty years and who voted for President Trump, believes that the Obama presidency was a cancer on the nation. Obama, according to my father, passed the Affordable Care Act (ACA) on a foundation of lies. Most significantly, Obama falsely promised voters that they would be able to keep their health insurance plans.<sup>59</sup> So, his logic goes, the Democrats are just as committed to willful ignorance as the GOP, and when one considers hyper-partisan gerrymandering in Maryland,<sup>60</sup> it becomes clear that Democrats are just as committed to anti-democratic practices as the GOP. This false equivalence fails to persuade because there is no parallel between GOP and Democratic practices with respect to the four dimensions of radicalism.

With respect to willful ignorance, the point is not that Republicans lie more often than Democrats, although a comparison of fabrication rates is striking, with the *New York Times* reporting that “[i]n his first 10 months, Trump told nearly six times as many falsehoods as Obama did during his entire presidency, . . . an average of about two a year for Obama and 124 a year for Trump.”<sup>61</sup> The point, rather, is that the entirety of the GOP’s political project is organized around willful ignorance, deception, and fabrication.<sup>62</sup>

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lying about the policy consequences of Republican control or by emphasizing sham problems like voter fraud that divert the public’s attention from the GOP’s anti-democratic practices. See, e.g., John Fund & Hans A. von Spakovsky, *Voter fraud exists – Even though many in the media claim it doesn’t*, FOX NEWS (Oct. 27, 2018), <https://www.foxnews.com/opinion/voter-fraud-exists-even-though-many-in-the-media-claim-it-doesnt>.

59. See Glenn Kessler, *Obama’s pledge that ‘no one will take away’ your health plan*, WASH. POST (Oct. 30, 2013, 6:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2013/10/30/obamas-pledge-that-no-one-will-take-away-your-health-plan/>.

60. See David Savage, *Supreme Court justices troubled by partisan gerrymandering, but unsure how to control it*, L.A. TIMES (Mar. 28, 2018), <https://www.latimes.com/politics/la-na-pol-court-gerrymander-maryland-20180328-story.html>.

61. David Leonhardt, Ian Prasad Philbrick, & Stuart A. Thompson, *Opinion | Trump’s Lies vs. Obama’s*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/12/14/opinion/sunday/trump-lies-obama-who-is-worse.html?>

62. For example, let us consider again the Affordable Care Act. My father says that Obama passed the ACA on a foundation of falsehoods, in particular the lie that Americans could keep their then-current coverage. According to the *New York Times*, however, once Obama realized that his statements were untrue, he “didn’t continue to claim that all Americans would be able to keep their existing health insurance under Obamacare.” See Leonhardt, Philbrick, & Thompson, *supra* note 61. Much more importantly, Obama was, on many dozens of occasions, fully candid with voters about his intent to pass a law to expand health insurance and about the contours of the ACA. The GOP, by contrast, organized its entire opposition to ACA around falsehoods: (1) The oft-repeated lie that the GOP supports expanding coverage; (2) The oft-repeated lie that the GOP has better plans to expand coverage; (3) The oft-repeated highly misleading claim that the ACA would include “government death panels,” as if private insurance does not ration; (4) The oft-repeated lie that Republicans were not consulted in

With respect to scapegoating, those who doubt my argument are urged to watch the three-minute *New York Times* video “Unfiltered Voices from Donald Trump’s Crowds,” and to specify a parallel on the Democratic side of the aisle.<sup>63</sup> Such a parallel cannot be identified.

With respect to prioritizing party over the national interest to an extreme degree, perhaps climate catastrophe is the most relevant data point for illustrating the difference between the two parties. Of course, Democrats seek to expand their power, but not at the price of the collapse of civilization, which \which some experts now believe to be soon and inevitable.<sup>64</sup> It is one thing to pursue partisan power. It is quite another to risk planetary collapse in order to pursue partisan power.

With respect to judicial theft, one cannot, with a straight face, conflate Joe Biden’s 1992 argument that President Bush “should delay filling a Supreme Court vacancy, should one arise, until the presidential election was over” with Mitch McConnell’s actual theft of the Court.<sup>65</sup>

Finally, with regard to anti-democratic practices, there is no modern-era equivalent to the orchestrated, fifty-year campaign to prevent racial minorities from voting. This campaign has included two generations of jurisprudence as well as phony rhetoric—on a national scale—about the nonexistent problem of voter fraud, combined with multiple post-*Shelby County*<sup>66</sup> state-level voter ID laws and other initiatives to purge voter rolls of racial minorities. These are Jim Crow-esque tactics on a massive scale, and they emanate exclusively from the right.

### III. ELECTORAL POLITICS WILL NOT DE-RADICALIZE THE GOP

Progressives who prioritize electoral politics, modest good-government reforms, and the preservation of norms over Constitutional hardball believe that by winning at the ballot box, Democrats can teach Republicans that radicalism is a losing electoral strategy. *Crooked Media*’s Jon Lovett summarized this view before the recent midterms: “There is only one thing we can do, which is stamp out this form of Republicanism, defeat it completely and govern without them until they learn that there’s a price to be paid for the kind of

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the process of crafting and passing the ACA; (5) The oft-repeated lie that single payer health care would increase costs and decrease quality of care. See *Debunking the Trump Administration’s Health Care Lies*, PROTECT OUR CARE, <https://www.protectourcare.org/debunking-trump-administration-lies/> (last visited Oct. 28, 2019). One cannot, with a straight face, compare the Democrats’ and the GOP’s relationship to willful ignorance vis a vis health care or any other issue.

63. See Berenstein, Corasaniti, & Park, *supra* note 29.

64. See Jem Bendell, *Deep Adaptation: A Map for Navigating Climate Tragedy*, INST. FOR LEADERSHIP AND SUSTAINABILITY OCCASIONAL PAPER 2 (2018).

65. Julie Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, N.Y. TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html>.

66. *Shelby County v. Holder*, 570 U.S. 529 (2013); see *infra* note 138 and accompanying text.

politics they've practiced."<sup>67</sup>

As long as Republicans remain radicalized, however, democracy probably cannot be restored, regardless of what happens at the ballot box. Reviving democracy requires the passage of durable laws, but radical Republicans probably will be able and willing to block or dismantle those laws for the indefinite future. Perhaps, if Democrats were able to dominate federal and state electoral politics for a long time, with few interruptions, they might be able to restore the political system.<sup>68</sup> Then, maybe Republicans would, as Lovett suggests, "learn that there's a price to be paid for the kind of politics they've practiced."<sup>69</sup>

Democrats, however, are unlikely to achieve long-term electoral dominance. American electoral politics are cyclical, and even under normal circumstances, it is somewhat rare for Democrats to take control of the legislative and executive branches simultaneously.<sup>70</sup> The best Democrats probably can hope for is two years of control from time to time, but without a Senate super-majority.

While Democrats may not be able to achieve long-term dominance, perhaps occasionally winning at the ballot box can produce the effect that Jon Lovett described, teaching Republicans that radicalism is a losing electoral strategy. Unfortunately, there is little available evidence to support the

67. Jon Lovett, *Barack to the Future*, POD SAVE AM. PODCAST (Sept. 11, 2018), <https://crooked.com/podcast/barack-to-the-future/>. Lovett was summarizing the position that electoral politics can de-radicalize the GOP, not necessarily endorsing it.

68. Long-term control of the House, Senate and White House, including super-majority control of the Senate, could enable Democrats to pass laws banning voter suppression, gerrymandering and dark money, and, over time, to replace radical, Republican-appointed Justices and judges. Long-term electoral dominance in the states might help as well and could lead to the effective dismantling the Electoral College via passage of the National Popular Vote Interstate Compact. See *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, <https://www.national-popularvote.com/written-explanation> (last visited Sept. 27, 2019).

69. Lovett, *supra* note 67.

70. Notice that the same pattern has repeated itself twice over the past thirty-eight years. In both cycles of the pattern, long periods of Republican rule inflicted considerable damage that resulted in landslide Democratic presidential victories (in 1992 and 2008). See Tony Monkovic, *50 Years of Electoral College Maps: How the U.S. Turned Red and Blue*, N.Y. TIMES (Aug. 22, 2016), <https://www.nytimes.com/2016/08/23/upshot/50-years-of-electoral-college-maps-how-the-us-turned-red-and-blue.html>. In both cases, however, Democrats were soundly defeated in subsequent midterms (1994 and 2010), losing control of at least one Congressional chamber after only two years at the helm. *Id.* Thus, over the past thirty-eight years, there were only two two-year periods (1993-1995 and 2009-2011) when Democrats had a reasonable chance of passing bold, progressive legislation. *Id.* More recently, the consolidation of the GOP's structural advantages in the House and Senate as well as relentless Republican anti-democratic practices have made it even more difficult for Democrats to achieve single-party control. Even in the best case, absent a fundamental re-alignment or exogenous shock, Democrats have little chance of taking long-term control of the executive and legislative branches simultaneously. See *America's electoral system gives the Republicans advantages over Democrats*, THE ECONOMIST (July 12, 2018), <https://www.economist.com/briefing/2018/07/12/americas-electoral-system-gives-the-republicans-advantages-over-democrats>.

position that intermittent electoral defeats have a moderating impact on the Republican party. Nationally, the GOP was walloped in the 1992, 2006, 2008, and 2018 elections, and soundly defeated in 1996 and 2012, but with each electoral defeat, the party became more radical.<sup>71</sup> After the 2012 election, GOP leaders even performed an autopsy concluding that radicalism is a losing political strategy, but then lined up behind now-President Trump's radicalism during the 2016 campaign and beyond.<sup>72</sup>

Electoral defeats do not and probably will not teach Republicans that radicalism is a losing strategy because neither the capital wing nor the resentment wing of the party needs to win every election to get what it wants. The capital wing of the of the GOP can achieve much of its agenda even while in the minority, especially if radical Justices retain control of the Supreme Court, enabling Republicans to enact regressive economic policies such dismantling unions through the judiciary.<sup>73</sup> While the Obama administration (barely) enacted three laws that the GOP's capital wing detests (the Affordable Care Act, Dodd-Frank, and the modest 2012 tax hike), Republicans can easily leverage procedures that enable obstructionism to ensure that such victories are few and far between. Even if the GOP loses a string of federal elections, it can use the Senate's sixty-vote super-majority requirement, with rare exceptions, to prevent the passage of significant tax hikes on the wealthy and significant expansion of the welfare state. In turn, an obscure parliamentary procedure known as reconciliation enables Republicans, when in power, to invoke a fifty-vote Senate threshold for tax cuts.<sup>74</sup> The cumulative effect of these dynamics is that the capital wing wins gradually over time, as suggested by the decline in top marginal income tax rates over the past half century. In 1963, the top rate was 91 percent, but by 2017 the rate had been cut to 37 percent, which is quite low in comparison to top rates in other western, industrialized countries.<sup>75</sup> The capital wing of the GOP has almost no incentive to de-

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71. Marc Fisher, *GOP Platform through the Years Shows Party's Shift from Moderate to Conservative*, WASH. POST (Aug. 28, 2012), [https://www.washingtonpost.com/politics/gop-platform-through-the-years-shows-partys-shift-from-moderate-to-conservative/2012/08/28/09094512-ed70-11e1-b09d-07d971dee30a\\_story.html](https://www.washingtonpost.com/politics/gop-platform-through-the-years-shows-partys-shift-from-moderate-to-conservative/2012/08/28/09094512-ed70-11e1-b09d-07d971dee30a_story.html); see also Boris Shor, *Asymmetric Polarization in the State Legislatures? Yes and No*, AM. LEGISLATURES (July 29, 2013), <https://americanlegislatures.com/2013/07/29/partisan-polarization-in-state-legislatures/>.

72. Henry Barbour, Sally Bradshaw, Ari Fleischer, Zori Fonalledas, & Glenn McCall, *Growth and Opportunity Project*, REPUBLICAN NAT'L COMMITTEE REP. (2013), <https://online.wsj.com/public/resources/documents/RNCreport03182013.pdf>.

73. Noam Scheiber, *Trump Nominee Is Mastermind of Anti-Union Legal Campaign*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/business/economy/union-fees-lawyer.html>.

74. Victoria Bassetti, *Why Mitch McConnell Will Keep the Legislative Filibuster*, BRENNAN CTR. (Apr. 28, 2017), <https://www.brennancenter.org/blog/why-mitch-mcconnell-will-keep-legislative-filibuster>.

75. See *Historical Highest Marginal Income Tax Rates*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates> (last visited Sept. 27, 2019). For a comparison of top marginal rates internationally, see *Individual Income Tax Rates Table*, KPMG, <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/individual-income-tax-rates-table.html> (last visited Sept. 27, 2019).

radicalize even if Democrats prevail at the ballot box from time to time.

Nor does the resentment wing of the party have much of an incentive to de-radicalize if Republicans occasionally lose elections. The GOP's resentment wing probably will remain loyal to the party as long as Republican leaders continue to manufacture fear for voters to consume.

#### IV. ONLY CONSTITUTIONAL HARDBALL CAN RESTORE DEMOCRACY

Constitutional hardball offers the only viable response to GOP radicalism, most especially regarding the theft of the courts. If Democrats re-take the White House and Senate in 2020 while retaining control over the House of Representatives, they should implement the following agenda:

##### A. *Modify Senate Rules*

As soon as Democrats re-take control of the Senate, they should eliminate rules that allow minorities of Senators to kill legislation and that enable individual Senators to prevent the Senate from conducting business.<sup>76</sup> Currently, super-majorities are required for the Senate to approve most bills, and obscure procedures allow individual Senators to grind the chamber to a halt.<sup>77</sup> Republicans abuse these procedural options to sustain historically unprecedented obstructionism, thus preventing Democrats from governing, even when they have clear popular mandates.<sup>78</sup>

Modifying Senate rules will give the Democrats a chance to restore democracy by passing laws that add seats to the courts and un-rig the system. As well, modifying Senate rules may make it possible to enact policy change such as Medicare-for-all. No major procedural or policy changes are remotely possible as long as current Senate rules remain in place, even if Democrats re-take control of government. All of them, however, will suddenly be on the table if Democrats modify Senate rules. Senate procedures that allow obstructionism are not required by law, and the Senate is free to eliminate them with a simple majority vote.<sup>79</sup> The Senate has modified its rules many times, and

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76. See Andrew Duehren, *Senate GOP Invokes 'Nuclear Option' to Change Rules by Simple Majority*, WALL STREET J. (Apr. 3, 2019, 6:54 PM), <https://www.wsj.com/articles/senate-gop-invokes-nuclear-option-to-change-rules-along-party-lines-11554321727>.

77. See, e.g., VALERIE HEITSHUSEN, CONG. RES. SERV., RL 7-5700, THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION (2019), <https://www.senate.gov/CRSPubs/5c970bdd-ed33-446c-a646-cda331d7b108.pdf>.

78. See, e.g., Nicholas Fandos, *New Election Security Bills Face a One-Man Roadblock: Mitch McConnell*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2019/06/07/us/politics/election-security-mitch-mcconnell.html>.

79. Mark Strand & Tim Lang, *The U.S. Senate Filibuster: Options for Reform*, CONG. INST. (Sept.

the Constitution does not mention filibusters, unanimous consent, Senate holds, or “blue slips.” The Founding Fathers arguably expected that, except in rare cases such as impeachment, Congressional votes would be decided by a simple majority, not a super-majority.<sup>80</sup>

Senate rules that enable Republican obstructionism explain why President Obama’s first term achievements, while impressive, fell far short of what he could have accomplished.<sup>81</sup> If the Senate had modified its rules in January 2009, Obama probably would have added a public option to the Affordable Care Act, expanded the size of the stimulus, reformed the immigration system, enacted tougher Wall Street regulations, and passed a climate change bill as well as “card-check” legislation for unions.<sup>82</sup> Because Republicans obstructed all of these proposals, none of them became law, even though all had the support of more than fifty Senators.<sup>83</sup>

Thanks in part to Senate obstructionism, Congressional gridlock is arguably at an all-time high, and Congressional effectiveness at an all-time low.<sup>84</sup> This Congressional paralysis, in turn, may heighten citizens’ cynicism about Washington because politicians cannot deliver on campaign pledges. When voters send elected officials to Washington with a clear mandate for change, obstructionist tactics prevent them from accomplishing most of what the voters want, and inaction confirms popular suspicions about government’s inability to improve citizens’ lives. Modifying Senate rules could reduce cynicism by making government more responsive to voters, especially after landslide elections.<sup>85</sup>

Many progressives fear that if Democrats eliminate the filibuster and other Senate procedures that impede majority rule, then Republicans could take advantage of the new fifty-vote threshold to pass harmful legislation, such as privatizing Social Security. Modifying Senate rules will incur risk, but the risk is lower than may be apparent. Perhaps the best evidence for this point is that, while Senator McConnell arguably has demonstrated that he is more committed to Republican party control than democratic norms, he has

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9, 2017), <http://conginst.org/2017/09/25/the-u-s-senate-filibuster-options-for-reform/>.

80. Thomas Geoghegan, *Mr. Smith Rewrites the Constitution*, N.Y. TIMES (Jan. 10, 2010), <https://www.nytimes.com/2010/01/11/opinion/11geoghegan.html>.

81. See Williams A. Galston, *President Barack Obama’s First Two Years: Policy Accomplishments, Political Difficulties*, BROOKINGS (Nov. 4, 2010), <https://www.brookings.edu/research/president-barack-obamas-first-two-years-policy-accomplishments-political-difficulties/>.

82. See, e.g. Jason Rodrigues, *The Obama years: timeline of a presidency*, THE GUARDIAN (Jan. 3, 2017), <https://www.theguardian.com/us-news/2017/jan/03/the-obama-years-timeline-of-a-presidency>.

83. *But see* Galston, *supra* note 81.

84. According to a 2012 report from the Brennan Center, “[t]he current Senate passed a record-low 2.8 percent of bills introduced in that chamber, a . . . 90 percent decrease from the high in 1955-1956.” MARZIANI, *supra* note 52.

85. See Vicki Birchfield & Markus M.L. Crepaz, *The Impact of Constitutional Structures and Collective and Competitive Veto Points on Income Inequality in Industrialized Democracies*, 34 EUR. J. OF POL. RES. 175, 175–200 (1998) (explaining the relationship between competitive veto points and economic inequality).

not eliminated the filibuster for statutes, probably because he knows that, on balance, it is good for the GOP and bad for Democrats.<sup>86</sup>

With respect to the repeal of currently-existing legislation, the filibuster's sixty-vote threshold usually prevents Democrats from repealing laws that they oppose. By contrast, the primary obstacle preventing Republicans from overturning laws that they dislike, such as the Social Security Act, is not the filibuster, but rather the popularity of the legislation.<sup>87</sup> Eliminating the statutory filibuster would therefore make it easier for Democrats to repeal laws that they oppose, but would not necessarily enable Republicans to overturn legislation that they dislike.

In 1967, Lloyd Free (a pollster) and Hadley Cantril (a psychologist) identified a contradiction in American public opinion. Free and Cantril showed that on one hand, most Americans are "ideological conservatives" who oppose establishing new government programs. At the same time, most Americans are "operational liberals" who support existing government programs that are already operating.<sup>88</sup> While that sounds abstract, the contradiction has a practical effect, because the public tends to oppose establishing new government programs, but once those programs are in effect, the public typically comes to like them.<sup>89</sup>

Along with filibuster reform, Democrats should eliminate Senate holds, blue slips, unanimous consent, and any other Senate procedure that requires super-majority approval, or that allows individual Senators to prevent the Senate from approving judges or conducting other business. Otherwise, Republicans will not let Democrats govern.

### B. Expand Federal Courts

Immediately upon re-taking control of government, Democrats should pass a law expanding the size of the Supreme Court and increasing the number

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86. To appreciate McConnell's calculus, it is necessary to distinguish between the politics of passing new laws and the politics of repealing currently existing legislation. With respect to the former, Republicans, unlike Democrats, already enjoy a fifty-vote threshold—rather than the sixty votes necessary to overcome a filibuster—for much of what they want to get done thanks to Senate procedures such as reconciliation. As Brennan Center contributor Victoria Bassetti observes, "Republicans are free to slash budgets, taxes, and programs, and not face a filibuster. By contrast, if Democrats want to create new rules or programs, they're likely to run into the filibuster wall." Bassetti, *supra* note 74.

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

88. LLOYD A. FREE & HADLEY CANTRIL, *THE POLITICAL BELIEFS OF AMERICANS: A STUDY OF PUBLIC OPINION* (1967).

89. For example, it was public support for retirement insurance, not the filibuster, that prevented former President George W. Bush from privatizing Social Security. Galston, *supra* note 87.

of district and appellate court judges. The number of Supreme Court Justices changed seven times in the nineteenth century, and there is no legal or constitutional requirement to cap the Court's size at nine.<sup>90</sup> Nor is there any constitutional requirement to fix the size of the district or appellate courts at their current levels. To be clear, the primary impetus for action is neither harmful jurisprudence nor the fact that over the past generation, Republican nominees to the bench have become more extreme. The impetus is Republican theft of the courts.<sup>91</sup> As law professor Mark Tushnet argues, “[y]ou [cannot] steal a Supreme Court seat and expect to get away with it.”<sup>92</sup>

The *New York Times* reports that “In Obama’s final two years, [eighteen] of his district nominees and just one of his appellate court nominees were confirmed—the lowest number since Harry Truman was president.”<sup>93</sup> Thanks to Republican obstructionism, Trump inherited 107 judicial vacancies and an open Supreme Court seat.<sup>94</sup> Then, following the 2016 election, Republicans declined to let Democratic Senators avail themselves of the procedure that the GOP had used to block Obama’s appellate nominees, thus allowing Donald Trump, in his first nineteen months in office, to fill twenty-four appellate judgeships.<sup>95</sup> By contrast, during his first forty-eight months in office, President Obama was able to fill just fifteen appellate judgeships.<sup>96</sup>

After passing a law to expand the size of the Supreme Court and increase the number of district and appellate court judges, Democrats should call for a truce by endorsing a constitutional amendment to maintain the new size of the judiciary and require the Senate to vote on future nominees quickly. Republicans probably would refuse to support the amendment. If the GOP responds in kind by again stealing the courts when they next have the opportunity to do so, then Democrats can keep adding judges each time they regain power. The tit-for-tat spiral of retaliation could harm the courts’ legitimacy,<sup>97</sup> but that may be a better outcome than passively allowing the GOP theft of the judiciary.

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90. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 131 (2018).

91. Franklin Delano Roosevelt’s attempt to expand the Supreme Court was motivated by a disagreement over jurisprudence, not judicial theft. See JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010). Although Democrats enjoyed a super-majority in 1937, their electoral successes concealed a rift between southern white supremacists and the rest of the party. *Id.* Southern Democrats feared that if they allowed FDR to pack the Court, he would appoint Justices who would curtail Jim Crow apartheid. *Id.*

92. Mark Tushnet, *Expanding the Judiciary, the Senate Rules, and the Small-c Constitution*, BALKINIZATION BLOG (Nov. 25, 2017), <https://balkin.blogspot.com/2017/11/expanding-judiciary-senate-rules-and.html>.

93. Zengerle, *supra* note 55.

94. See Russell Wheeler, *Senate obstructionism handed a raft of judicial vacancies to Trump—what has he done with them?*, BROOKINGS (June 4, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/>.

95. See Zengerle, *supra* note 55.

96. *Id.*

97. Tushnet, however, contextualizes concerns about tit-for-tat retaliation and judicial legitimacy: “For me, the baseline here is already quite low. Does anyone seriously think that Republicans treat 5-4 liberal decisions as having any legitimacy at all?” See Tushnet, *supra* note 92.

### C. *Un-Rig Democracy Aggressively*

Once Democrats modify Senate rules and expand the courts, they should immediately enact a range of measures to increase participation in the political process and undo decades of Republican anti-democratic practices. While the House Democrats' forthcoming reform bill is a good start, it is too modest, as neither banning voter suppression nor curtailing dark money addresses structural obstacles in the Senate.<sup>98</sup> If Democrats are serious about un-rigging democracy, they must do so aggressively.

#### 1. Voting

Following the recommendations of the Brennan Center and political science professor David Faris, Congress should pass a comprehensive Voting Rights Act to ensure that all Americans have the right to vote and an equal opportunity to vote, and that voting is convenient for everyone.<sup>99</sup> By requiring states to follow the Brennan Center's plan for registration modernization, fifty million voters could be added to the rolls.<sup>100</sup> The Act should enfranchise convicted felons, 6.1 million of whom were denied the right to vote in 2016. Finally, the Act should protect United States elections from foreign influence.<sup>101</sup>

#### 2. Gerrymandering

The National Democratic Redistricting Committee (NDRC), chaired by former U.S. Attorney General Eric Holder, has endorsed policies that minimize partisanship in the drawing of congressional districts.<sup>102</sup> As well, the Brennan Center has offered recommendations for reforming the redistricting process so as to create fair, competitive maps.<sup>103</sup> Congress should use its powers under the Constitution's Elections Clause to ban extreme gerrymandering and require states to follow the recommendations of the NDRC and the

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98. See Zach Montellaro, *House Democrats forge ahead on electoral reform bill*, POLITICO (Feb. 26, 2019), <https://www.politico.com/story/2019/02/26/democrats-electoral-reform-bill-1188437>.

99. See BRENNAN CTR., *DEMOCRACY: AN ELECTION AGENDA FOR CANDIDATES, ACTIVISTS, AND LEGISLATORS 5* (Wendy Weiser & Alicia Bannon eds., 2018), <https://www.brennancenter.org/publication/democracy-election-agenda-2018>; see also FARIS, *supra* note 9, at 139.

100. See BRENNAN CTR., *supra* note 99, at 6.

101. See BRENNAN CTR., *supra* note 99, at 5–6, 15–18; see also Christopher Uggen, Ryan Larson, & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENTENCING PROJECT (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

102. See *About the NDRC*, NAT'L DEMOCRATIC REDISTRICTING COMMITTEE, <https://democraticredistricting.com/about/> (last visited Sept. 27, 2019).

103. See BRENNAN CTR., *supra* note 96, at 28–32.

Brennan Center.

### 3. Statehood

One of the central pillars of American democracy is that all citizens must be represented in government. Residents of the District of Columbia and Puerto Rico, however, are American citizens who lack meaningful Congressional representation. The absence of political representation is inconsistent with the spirit of democracy, and sustains federal financial neglect as well, such as the Trump administration's anemic response to Hurricane Maria.<sup>104</sup> Congress should offer statehood to Washington, DC and to Puerto Rico, thus expanding the size of the Senate to 104 if citizens of those two locales vote to accept statehood.

### 4. Citizenship

It is undemocratic for twelve million undocumented immigrants to live in fear that they will be deported and to be denied equal protection under the law. Our national conversation has elided the U.S. role in helping to create conditions in Central and South America that effectively force many people to emigrate, as well as the \$12 billion per year that undocumented immigrants pay in state and local taxes and the \$9 billion per year that they pay in payroll taxes, even though few will ever receive Social Security or Medicare benefits.<sup>105</sup> Once Democrats re-take control of the legislature and White House, Congress should create a quick path to citizenship for all law-abiding immigrants.

### 5. Campaign Finance

Congress should eliminate dark money in politics by passing the DISCLOSE Act, which would require super PACs and other organizations that spend in federal elections to disclose their donors to the public.<sup>106</sup> Passing the DISCLOSE Act would, in effect, annul the *Citizens United*<sup>107</sup> decision.

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104. Patricia Mazzei, *What Puerto Rico Is, and Isn't, Getting in Disaster Relief*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/2018/02/08/us/puerto-rico-disaster-relief.html>.

105. See Alexia Fernández Campbell, *Trump says undocumented immigrants are an economic burden. They pay billions in taxes*, VOX (Oct. 25, 2018), <https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes?c=1>; Lisa Christensen Gee, Matthew Gardner, Misha Hill, & Meg Wiehe, *Undocumented Immigrants' State & Local Tax Contributions*, INST. ON TAX'N & ECON. POL'Y (2017), [https://www.immigrationresearch.org/system/files/immigration\\_taxes\\_2017.pdf](https://www.immigrationresearch.org/system/files/immigration_taxes_2017.pdf).

106. H.R. 6239, *Democracy Is Strengthened by Casting Light on Spending in Elections Act of 2018*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/6239/text> (last visited Sept. 27, 2019); Michael Sozan, *Congress Can Protect Midterm Elections with the Disclose Act*, THE HILL (July 3, 2018), <https://thehill.com/opinion/campaign/395391-congress-can-protect-midterm-elections-with-the-disclose-act>.

107. *Citizen's United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Congress should also pass a mandatory version of the Fair Elections Now Act, which would curtail the impact of elite and corporate donors by transforming the current large-dollar private campaign financing system to one based on small-dollar public funding.<sup>108</sup>

## V. GOP RADICALISM AND JUDICIAL INDEPENDENCE

Professor Ledewitz argues that if Democrats expand federal courts, the independence of the judiciary and the rule of law would be destroyed.<sup>109</sup> His argument echoes the inaccurate and disingenuous claims by Chief Justice Roberts that, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges.”<sup>110</sup> However, if there were no such thing as Obama or Trump judges, the GOP would not have stolen the Supreme Court. Republicans would have allowed Obama to fill lower court vacancies between 2009 and 2013, and again between 2015 and 2017. Upon Trump’s ascent, the GOP-led Senate would not have discarded the very procedures, such as blue slips, that they had abused to block Obama from filling vacancies. And conservative donors would not have spent hundreds of millions of dollars to promote conservative judges.<sup>111</sup>

Political scientists Steven Levitsky and Daniel Ziblatt outline three possible future scenarios for American politics in their important book *How Democracies Die*.<sup>112</sup> The first scenario, quick democratic recovery, remains elusive at this time.<sup>113</sup> The second, democracy without guardrails, is “marked by polarization, more departures from unwritten political conventions, and increasing institutional warfare,” as is evident in recent political developments in North Carolina.<sup>114</sup> Levitsky and Ziblatt suggest that this democracy-

108. See S. 1640, *Fair Elections Now Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/1640/> (last visited Sept. 27, 2019).

109. See Ledewitz, *supra* note 1, at 10–12, 14–15.

110. See John Roberts said there are no Trump judges or Obama judges. Clarence Thomas didn’t get the memo., WASH. POST (June 28, 2019), [https://www.washingtonpost.com/opinions/john-roberts-said-there-are-no-trump-judges-or-obama-judges-clarence-thomas-didnt-get-the-memo/2019/06/28/00ec5db0-99c6-11e9-8d0a-5edd7e2025b1\\_story.html](https://www.washingtonpost.com/opinions/john-roberts-said-there-are-no-trump-judges-or-obama-judges-clarence-thomas-didnt-get-the-memo/2019/06/28/00ec5db0-99c6-11e9-8d0a-5edd7e2025b1_story.html).

111. See Robert O’Harrow Jr. & Shawn Boburg, *Inside a conservative activist’s behind-the-scenes campaign to remake the nation’s courts*, ANCHORAGE DAILY NEWS (May 21, 2019), <https://www.adn.com/nation-world/2019/05/21/inside-a-conservative-activists-behind-the-scenes-campaign-to-remake-the-nations-courts/>.

112. See LEVITSKY & ZIBLATT, *supra* note 90, at 206–12.

113. See *id.* at 208.

114. See *id.* After Democrat Roy Cooper defeated Republican Pat McCrory in the 2016 gubernatorial race, McCrory refused to concede for a month and then Republicans in the state legislature tried to use a parliamentary procedure to declare McCrory the victor. See Richard Faussett, *North Carolina Governor Signs Law Limiting Successor’s Power*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/us/pat-mccrory-roy-cooper-north-carolina.html>. When the attempted coup

without-guardrails scenario describes the “most likely, post-Trump future.”<sup>115</sup> The third, and worst, scenario is durable white nationalist electoral rule in which “Republicans continue to win with a white nationalist appeal.”<sup>116</sup> Under this nightmare scenario, “Republicans could impose their agenda even with narrow majorities.”<sup>117</sup>

Those who believe that electoral politics, modest good-government reform and the preservation of norms can save democracy fail to appreciate that despite Democrats’ ability to win federal elections from time to time, the third scenario of durable white nationalist rule has already materialized. As noted above, the combination of GOP structural advantages and anti-democratic practices make it difficult for Democrats to win elections.<sup>118</sup> Even when they do win elections, Democrats can barely enact new laws thanks to GOP obstructionism.<sup>119</sup> And, the current Supreme Court probably will be even less willing than Kennedy Court to uphold new, progressive legislation that Democrats manage to pass.<sup>120</sup> Arguably, the situation is even worse than Levitsky and Ziblatt’s nightmare scenario, in that Republicans do not need a narrow majority to enact their agenda, which they have implemented despite repeatedly losing the national popular vote.

The effective freezing of Democrats out of power is hidden in plain site by a variety of factors that conceal radicalism’s effects. Thus, it should come as no surprise that scholars, journalists, and judicial reform advocates who I interviewed continue to emphasize electoral politics, modest reform, and the preservation of norms and to reject hardball. Most express at least some degree of faith in the judiciary’s integrity and doubt my conjecture that the current Supreme Court may be quite willing to overturn new, progressive legislation and to allow the ongoing erosion of democracy. One of the nation’s most respected Supreme Court experts questioned my prediction that if Congress approves a new coverage formula for the Voting Rights Act, the Court probably will overturn it. “At least they would have to provide a reason,” according to the expert.<sup>121</sup>

Norman Siegel wrote in January 2018 that, “the federal district courts and the U.S. Court of Appeals have consistently and steadfastly resisted and overruled over reaching aspects of the Trump agenda.”<sup>122</sup> As of January, according to Siegel, the administration had lost thirty-seven out of thirty-eight

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failed, Republican legislators passed laws to strip power away from the incoming governor. *Id.*

115. See LEVITSKY & ZIBLATT, *supra* note 90, at 208.

116. See *id.* at 207.

117. *Id.*

118. See *supra* Part II.D.

119. See *supra* Part II.D.2.

120. See *infra* notes 125–39 and accompanying text.

121. Private interview with the author (Oct. 27, 2018).

122. Norman Siegel, 2017: *The Constitution, Federal Courts and President Trump*, DECLARATION 17 (Jan. 7, 2018), <https://www.declaration17.com/2017-the-constitution-federal-courts-and-president-trump/>.

federal court decisions and orders.<sup>123</sup> More recently, a Trump-appointed federal judge ordered the White House to return CNN reporter Jim Acosta's credentials, and the *Washington Post* estimated that, "the number of rulings against [the] administration's actions now stands somewhere in the range of about [forty] to [fifty]."<sup>124</sup> Chief Justice John Roberts even scolded the President for disparaging the Ninth Circuit.<sup>125</sup> Professor Ledewitz adds that judges are not reliable partisan votes, that "Justices can be unpredictable," and that "constitutional jurisprudence has not consistently resulted in conservative outcomes."<sup>126</sup> He adds that "of course, Chief Justice Roberts [fits] this pattern."<sup>127</sup>

These arguments about judicial independence could have been taken seriously in 1989, 1999, and perhaps even 2009. But they are not serious arguments in 2019, because the Supreme Court has become a plainly partisan institution. Those who dispute such a notion point to the ostensible centrism of Chief Justice Roberts. According to data collected by Take Back the Court, however, Roberts has been one of the most conservative justices of the modern era.<sup>128</sup> Data indicate that there is essentially no partisan difference distinguishing his voting record from those of Justices Kavanaugh, Alito, Thomas and Scalia, and that Roberts almost always sides with the most conservative of his colleagues in 5-4 decisions: Justice Kavanaugh (89%); Justice Alito (88%); Justice Thomas (85%); Justice Scalia (84%).<sup>129</sup> Even in the two decisions that sustain his reputation for moderation, Roberts has advanced a partisan agenda under the guise of reasonableness by transforming easy constitutional questions into new opportunities for compromising democracy and for narrowing Congress's ability to protect the public.<sup>130</sup>

During his 2005 confirmation hearings, Chief Justice Roberts emphasized his respect for Supreme Court precedent, affirmed that flaws in a precedent are "not enough . . . to justify revisiting it," and underscored "the values of respect for precedent, evenhandedness, predictability, stability."<sup>131</sup> During his

123. *Id.*

124. Fred Barbash, *Trump judicial fantasy: What Chief Justice Roberts could have told him but didn't*, SFGATE (Nov. 22, 2018), <https://www.sfgate.com/news/article/Trump-judicial-fantasy-What-Chief-Justice-13414919.php>.

125. *Id.*

126. See Ledewitz, *supra* note 1, at 10–11.

127. *Id.* at 11.

128. Aaron Belkin & Sean McElwee, *Opinion | Don't Be Fooled. Chief Justice John Roberts Is as Partisan as They Come*, N.Y. TIMES (Oct. 7, 2019), <https://www.nytimes.com/2019/10/07/opinion/john-roberts-supreme-court.html>.

129. *Id.*

130. *Id.*

131. Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251, 1254 (2008).

fourteen years as Chief Justice, Roberts presided over twenty-one precedent-overturning cases, and voted to overturn precedent in seventeen of them (81%), making him the second most frequent member of the majority in precedent-overturning cases.<sup>132</sup> Only Justice Thomas has been a more frequent member of the majority in such cases (90%).<sup>133</sup> Nor is Chief Justice Roberts's voting record in precedent-overturning cases ideologically balanced. Quite to the contrary, his track record in such cases is among the most partisan of any Supreme Court Justice in the modern era. Fifteen of the twenty-one precedent-overturning cases that Roberts presided over ended in split 5-4 decisions with liberal and conservative blocs aligned against one another. In these fifteen ideologically charged cases, Roberts's voting record lines up almost perfectly with his partisanship. He voted to overturn precedent in all eleven of the fifteen cases with a conservative outcome, and in just one of the four cases with a liberal outcome. In the fifteen precedent-overturning cases with partisan implications, in other words, Justice Roberts voted for a conservative outcome fourteen times (93%). Chief Justice Roberts is one of only ten justices since 1946 to support 100% of decisions overturning precedent that led to conservative outcomes.<sup>134</sup>

Even before Justice Kavanaugh's confirmation, and with some important exceptions, the Kennedy Court arguably was quite committed to all four principles of Republican radicalism including willful ignorance, for example, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*<sup>135</sup>, scapegoating in *Trump v. Hawaii*<sup>136</sup>, prioritizing party over national interest to an extreme degree in *Bush v. Gore*<sup>137</sup>, and anti-democratic practices in *Shelby County v. Holder*.<sup>138</sup> While Justice Kennedy is widely viewed as a centrist, an

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132. See, e.g., Jacqueline Thomsen, *Conservative Supreme Court justices reverse precedent on property rights cases*, THE HILL (June 21, 2019), <https://thehill.com/regulation/court-battles/449710-conservative-supreme-court-justices-reverse-precedent-on-property>.

133. See Adam Liptak, *Precedent, Meet Clarence Thomas. You May Not Get Along.*, N.Y. TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/us/politics/clarence-thomas-supreme-court-precedent.html>.

134. See Belkin & McElwee, *supra* note 128.

135. 138 S. Ct. 1719 (2018) (demonstrating willful ignorance by misconstruing a Colorado official's isolated statement as widespread anti-religious bias that fatally tainted rulings by several officials and bodies that business owners must provide services to gay and lesbian customers); see *supra* Part II.A. (discussing willful ignorance).

136. 138 S. Ct. 2392 (2018) (demonstrating scapegoating by accepting the Trump administration's assertion that intolerance was not a pretextual motive for the travel ban, despite abundant evidence to the contrary); see also Ilya Somin, *Donald Trump's 'Travel Ban' Is Still a 'Muslim Ban' No Matter What the Supreme Court Ruled*, CATO INST. (June 26, 2018), <https://www.cato.org/publications/commentary/donald-trumps-travel-ban-still-muslim-ban-no-matter-what-supreme-court-ruled>; see *supra* Part II.B. (discussing scapegoating).

137. 531 U.S. 98 (2000) (demonstrating prioritizing party interest over national interest via the majority's anomalous, and seemingly hypocritical, exercise of federal authority over a state-run election to advance GOP partisan interests, while more typically refusing to exercise federal authority, or uphold the Equal Protection Clause, to vindicate the rights of minorities); see *supra* Part II.C. (discussing prioritizing party interest over national interest).

138. 570 U.S. 529 (2013) (demonstrating anti-democratic processes by advancing the false assertion that voters of color are no longer subject to systematic efforts to suppress their votes); see also Wendy

exhaustive review of his record concluded that “he voted with the court’s right wing in the majority of cases—including controversial, closely decided cases—throughout his career . . . [and] occupied the ideological middle ground on relatively few issues.”<sup>139</sup> With very few exceptions, in other words, the ostensibly moderate and independent Kennedy Court acted as a partisan instrument for the GOP and for corporations and the billionaire class.

The Kennedy Court’s gay rights record, along with a handful of decisions on abortion, affirmative action, and criminal justice, sustain a perception of moderation and sanitize a record replete with “indefensibly regressive constitutional jurisprudence.”<sup>140</sup> In similar fashion, the Supreme Court may pursue a reputation for moderation, at least in the short term. As one court expert observed, the threat of court expansion may, for the time being, deter the Court from “rear[ing] its ugly head again. My guess is that Roberts and possibly Kavanaugh as well will cool it for a couple of terms, for just that reason.”<sup>141</sup> According to the same expert, however, “Republicans are plainly intent on subverting democracy. When Dem[ocrats] try to respond by entrenching it, the Republican Court will invalidate most or all of those measures.”<sup>142</sup>

It does not strain credibility to posit that the current Court’s five conservative Justices are cynical individuals who, when viewed through the lens of Republican radicalism, may be just as committed to willful ignorance, scapegoating, prioritizing party over national interest, and anti-democratic practices as GOP voters and elected officials. Thus far, President Trump has lost the majority of lower court decisions, but he continues to pack the bench with Federalist Society loyalists.<sup>143</sup> As the balance of federal circuits shifts, lower courts will become less likely to hold the administration accountable for illegal conduct.<sup>144</sup> And, the Supreme Court will become less likely to compel the

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Weiser & Visha Agraharkar, *Ballot Security and Voter Suppression: What It Is and What the Law Says*, BRENNAN CTR. (Aug. 2019), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Ballot\\_Security\\_Voter\\_Suppression.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Ballot_Security_Voter_Suppression.pdf); see *supra* Part II.D. (discussing anti-democratic processes).

139. Out of 537 closely decided cases throughout his career, Kennedy sided with the conservatives in 383 decisions (71.3 percent), slightly less frequently than Justices Roberts (82.4 percent), Alito (84.1 percent) and Thomas (80.1 percent). Amelia Thomson-DeVeaux, *Justice Kennedy Wasn’t A Moderate*, FIVETHIRTYEIGHT (July 3, 2018), <https://fivethirtyeight.com/features/justice-kennedy-wasnt-a-moderate/>.

140. Private interview with the author (Oct. 16, 2018).

141. *Id.*

142. Private interview with the author (Oct. 27, 2018).

143. Eleanor Clift, *As Donald Trump and Senate Republicans Pack the Courts, Democrats Keep Playing Catch-Up*, DAILY BEAST (Nov. 5, 2018), <https://www.thedailybeast.com/as-donald-trump-and-senate-republicans-pack-the-courts-democrats-keep-playing-catch-up>.

144. *Confirmed Judges, Confirmed Fears: The Devastating Harm Caused by Confirmed Trump Federal Judges*, PEOPLE FOR THE AM. WAY (Apr. 2019), <http://www.pfaw.org/report/confirmed-judges-confirmed-fears-the-devastating-harm-already-done-by-confirmed-trump-federal-judges/>.

President to uphold the rule of law more generally. A Court that blesses hyper-partisan gerrymandering, unlimited dark money in politics, and the gutting of the Voting Rights Act is not an independent court that just calls balls and strikes. As long as Republicans remain radicalized, the Supreme Court likely will continue to act as a partisan institution, white-nationalist rule outlined in *How Democracies Die* probably will endure, and repairing the political system probably will remain all but impossible.

Observers like Professor Ledewitz worry that if Democrats expand federal courts, Republicans will respond in kind, and that the race to the bottom will destroy the judiciary as well as the rule of law more broadly.<sup>145</sup> Those who express this concern assume that if and when Democrats regain a majority on the Court via normal rotation, assuming that they have not pursued expansion, that the GOP would refrain from expanding the Court at its first opportunity to do so. This assumption seems quite curious to me given the party's deep commitment to anti-democratic practices; that the GOP has already broken norms to steal the Court; and that the Federalist Society Chair proposed a court expansion scheme in 2017, more than a year before Democratic politicians began to entertain the idea.<sup>146</sup> When property is stolen, the possibility that it could be stolen again does not justify foregoing efforts to recovering it, so concerns about the GOP's future efforts to re-steal the Court should not prevent Democrats from trying to fix the problem in the here and now. Expansion is the only way to restore the Court, and if the GOP steals it again, the country will not be any worse off than today. Cycling between Republicans stealing the Court and Democrats restoring it is far better than unilateral surrender.

More broadly, the biggest threat to the Court's legitimacy is the ill-gotten conservative majority's overturning of democratically enacted laws and longstanding, hard-won rights in order to advance a partisan political agenda as well as the interests of corporations and the billionaire class. The Founders understood quite well that the way to deal with partisan efforts to steal Supreme Court seats was to address the problem head on by adding seats to undo the norm-breaking. After Thomas Jefferson won the presidential election, the outgoing Congress eliminated a Supreme Court seat to try to prevent him from filling it.<sup>147</sup> Jefferson responded by working with his new supporters in

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145. See Ledewitz, *supra* note 1, at 15.

146. Steven G. Calabresi & Shams Hirji, *Proposed Judgeship Bill*, NW. PRITZKER SCH. OF L. PUB. L. & LEGAL THEORY SERIES (Nov. 7, 2017), <https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf>. Conservative scholars panned the idea at the time, but they did so knowing full well that Republicans had stolen the Supreme Court, and would soon regain control of lower federal courts by discarding procedures that GOP senators had abused to block Obama nominees. *Id.*

147. See Peter Onuf, *Thomas Jefferson: Domestic Affairs*, MILLER CTR., <https://miller-center.org/president/jefferson/domestic-affairs> (last visited Sept. 27, 2019) (discussing the passage of the Judiciary Act of 1801 which "reduced the number of Supreme Court justices from six to five, thus limiting Jefferson's ability to make Republican appointments").

Congress to add that seat back as soon as he took office.<sup>148</sup> As attorney and court historian Tim Burns has argued, “[f]ar from leading to democratic death spirals, changes to the size of the Court have gone hand in hand with the most vibrant periods of our democracy.”<sup>149</sup>

#### VI. CONCLUSION: “KICKED IN THE FACE” FOR THIRTY-FIVE YEARS

The primary threat to American democracy is Republican radicalism, which electoral politics have almost no chance of dismantling. The GOP’s structural advantages and relentless anti-democratic practices have combined to effectively freeze Democrats out of power, even if Democrats prevail at the ballot box from time to time. As argued above, however, it is easy to underestimate the degree of democratic decay and the extent to which Democrats have been excluded from power thanks to factors that conceal radicalism’s effects.

Given the Democrats’ structural challenge in the Senate, the 2020 election may be the party’s last opportunity for the foreseeable future to eke out a Senate majority while capturing the White House and retaining control of the House of Representatives. If Democrats manage to pull off a 2020 hat trick, and if they enact the hardball agenda quickly, they may level the playing field for the 2022 midterms and beyond. As noted above, offering statehood to Washington, D.C. and Puerto Rico would partially overcome the GOP’s demographic advantage in the Senate, and requiring states to follow the Brennan Center’s plan for registration modernization could add fifty million voters to the polls.<sup>150</sup> Enfranchising convicted felons would add 6.1 million eligible voters to the rolls nation-wide, and offering a quick path to citizenship to all law-abiding immigrants would add millions of eligible voters to the rolls as well. Protecting elections from foreign influence would help mitigate another unfair GOP advantage in recent elections.

Unless Democrats enact all three parts of the hardball agenda (modify Senate rules, expand the courts, un-rig the political system aggressively), democracy probably cannot be revived. Expanding the courts probably will be necessary to un-rig the system unless the current Supreme Court turns out to be more tolerant of democratic revitalization than the Kennedy Court. To pass legislation to un-rig the system and confirm judges quickly, however,

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148. *Id.*

149. Tim Burns, *Court-Packing Is Not a Threat to American Democracy. It’s Constitutional*, NEW REPUBLIC (Mar. 15, 2019), <https://newrepublic.com/article/153325/court-packing-not-threat-american-democracy-its-constitutional>.

150. BRENNAN CTR, *supra* note 99, at 6.

Democrats will need to modify Senate rules. Finally, if Democrats pursue modest good-government reforms rather than aggressive un-rigging, they will fail to level the playing field. Thus, Democrats will need to enact all three parts of the hardball agenda, not just one or two.

According to one democratization expert who opposes hardball, it would be better for Democrats “to continue to allow themselves to get kicked in the face for the next [thirty-five] years” than to risk expanding federal courts. While the expert may be right, acquiescence risks that the political system will remain rigged and that the government will continue to fail to address emergencies such as white supremacy, gun violence, inequality, and climate change. As political scientist Corey Robin argues, “[s]ometimes democracy requires the shattering of norms and institutions.”<sup>151</sup> Endorsing and then enacting the hardball agenda would incur risk but refusing to play hardball would incur greater risk. For that reason, law professors should support the democracy agenda.

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151. Corey Robin, *Democracy Is Norm Erosion*, JACOBIN (Jan. 29, 2018), <https://www.jacobin-mag.com/2018/01/democracy-trump-authoritarianism-levitsky-zillblatt-norms>.