

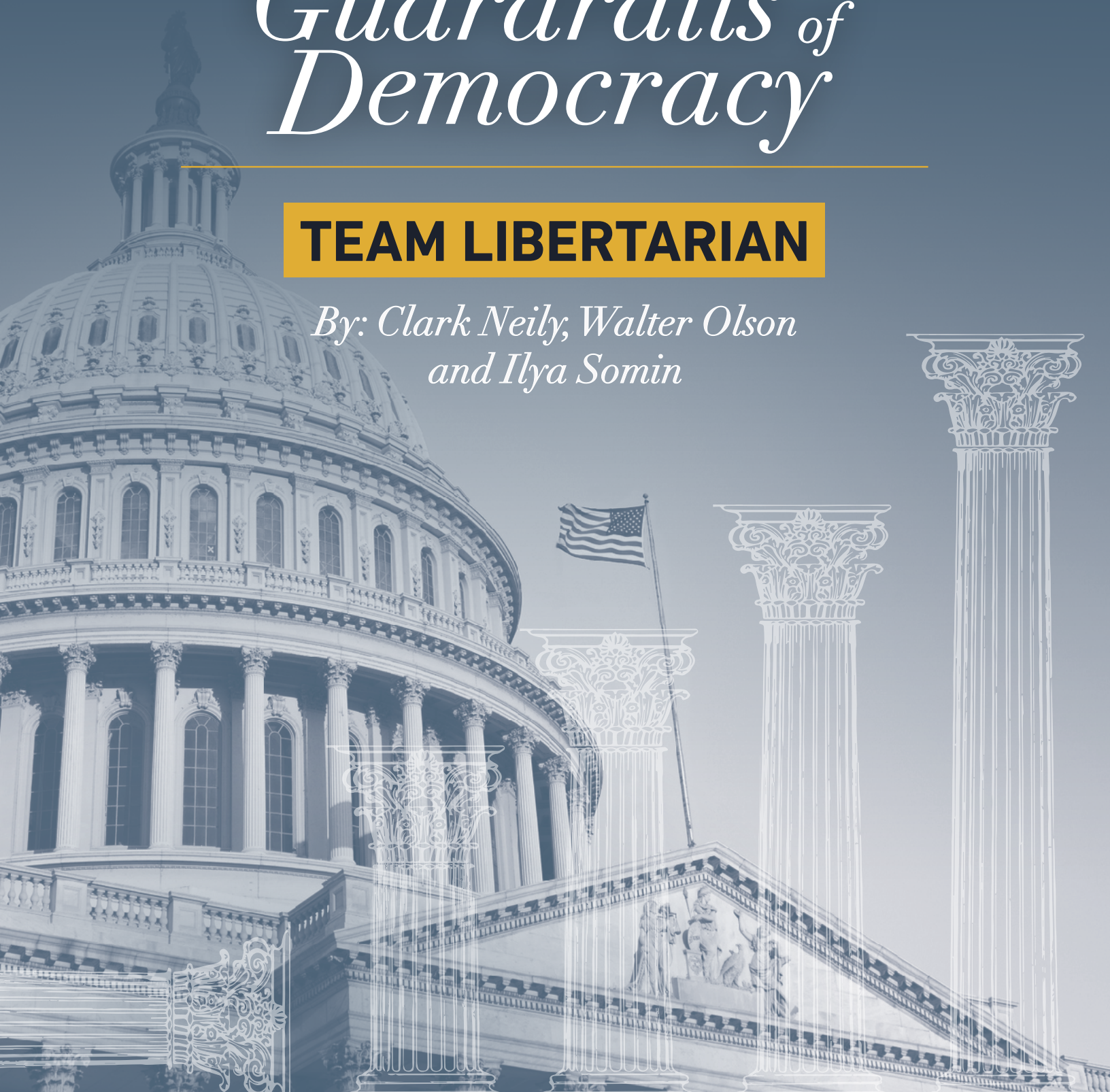
NATIONAL CONSTITUTION CENTER



**RESTORING THE**  
*Guardrails of  
Democracy*

**TEAM LIBERTARIAN**

*By: Clark Neily, Walter Olson  
and Ilya Somin*



# National Constitution Center's *Restoring the Guardrails of Democracy* Project

## TEAM LIBERTARIAN

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### INTRODUCTION

American democracy faces a number of serious challenges. In the immediate future, we must establish institutional safeguards to prevent the kind of negation of election results attempted by Donald Trump in the aftermath of the 2020 presidential election. In the medium-to long-run, more must be done to empower people to be able to make meaningful choices about the policies they live under. Ballot-box voting has great value. But it is not enough to ensure genuine political freedom. The latter requires enhancements to both “voice” and “exit” rights.<sup>2</sup> We need to both increase citizens’ ability to exercise voice within political institutions, and give them more and better exit options.

This report takes on all three challenges. We propose a variety of reforms that, can address immediate short-term threats to democracy, while also increasing citizen empowerment in the long run.

Part I outlines reforms that can safeguard the electoral process against attempts at reversal, while also curbing presidential powers that could be abused in ways that undermine democracy. Among the most urgently needed reforms are new constraints on presidential powers under vaguely worded emergency statutes, such as the Insurrection Act. These can too easily be manipulated by an unscrupulous administration in ways that could hobble democracy. It is also essential to reform the Electoral Count Act of 1887 in order to definitively preclude the sort of effort to overturn an election that then-President Trump engaged in after his defeat in 2020. In addition, we propose ways to incentivize electoral losers to concede defeat, rather than engage in bogus accusations of fraud and voter suppression, and to gradually restore public trust in the electoral system. Such norms are as important to protecting the democratic process as formal legal rules.

Part II describes how a number of serious flaws in the democratic process can be alleviated by expanding people’s opportunities to “vote with their feet.” Under conventional ballot-box voting, individual citizens usually have almost no chance of influencing the outcome. They also have strong perverse incentives to be “rationally ignorant” about the issues they vote on, and to process political information in a highly biased way. These problems are exacerbated by the enormous scope and complexity of modern government.

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<sup>1</sup> Clark Neily is senior vice president for legal studies at the Cato Institute. He served as co-counsel in the landmark Second Amendment case *District of Columbia v. Heller*, and is the author of *Terms of Engagement: How Our Courts Should Enforce the Constitution’s Promise of Limited Government*. Walter Olson is a senior fellow at the Cato Institute’s Robert A. Levy Center for Constitutional Studies and the author of several books on American law. Ilya Somin is Professor of Law at George Mason University. He is the author of *Free to Move: Foot Voting, Migration, and Political Freedom*, *Democracy and Political Ignorance*, and *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain*, and a regular contributor to the Volokh Conspiracy law and politics blog, hosted by Reason.

<sup>2</sup> The distinction draws on Albert O. Hirschman, *Exit, Voice, and Loyalty* (Cambridge: Harvard University Press, 1970).



Expanded foot voting rights can help alleviate these problems. People can vote with their feet choosing what jurisdiction to live in within a federal system, and also through making decisions in the private sector.<sup>3</sup> Relative to ballot box voters, foot voters have a much higher chance of making a decisive choice, and therefore much stronger incentives to become well-informed. Expanded foot voting can also help alleviate the dangerous polarization that has gradually poisoned our political system.

Much can be done to expand foot voting opportunities in both the public and private sector by breaking down barriers to migration, such as exclusionary zoning. Foot voting can also be facilitated through greater decentralization of political power, which would reduce the incidence of one-size-fits-all federal policies from which there is no exit, short of leaving the country entirely.

Finally, Part III outlines ways in which ordinary citizens can be empowered to exercise greater “voice” in their dealings with the criminal justice system, particularly through reviving the institution of the citizen jury. Since the Founding and before, jury trials have been understood as an important tool of popular participation in government. Alexis de Tocqueville famously focused on the jury system as one America’s most important institutions of “popular sovereignty.”<sup>4</sup> In at least one crucial respect, jury trials empower popular participation in governance even more than elections. In a jury proceeding, each individual juror has a much higher chance of affecting the outcome than does any one voter in an election, which in turn incentivizes jurors to become better-informed about the issues at stake.<sup>5</sup>

Sadly, in the modern criminal justice system, the constitutionally prescribed role of juries in resolving criminal charges has been almost entirely displaced by so-called plea bargaining. Indeed, widespread use of coercive plea-bargaining discourages the overwhelming majority of criminal defendants from exercising their right to a trial by jury, for fear that doing so would lead to far more severe penalties. As a result, citizen-jurors no longer exercise influence over those powers of government that directly impact the lives and liberty of the people more than most others.

We propose multiple reforms that can help restore juries to their proper role in the criminal justice system. Judges, governors, presidents, and legislators could adopt rules limiting the use of plea bargaining and especially coercive plea tactics. “Trial lotteries” could increase the number of cases brought to trial. State and federal governments can establish plea integrity units that can provide independent review of plea bargains to ensure that improper coercion was not used.

Within the trial process, more can be done to inform jurors of the full extent of their authority, particularly the ability to assess the justice of the laws and penalties in question, as well as factual questions related to the guilt of the accused.

Even if adopted in combination, our proposed reforms would not cure all the ills that afflict American democracy. But they can do much to shore it up against threats, and empower Americans to exercise greater control over the government policies they live under.

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<sup>3</sup> Ilya Somin, *Free to Move: Foot Voting, Migration and Political Freedom*, (New York: Oxford University Press, rev. ed. 2021), ch. 3.

<sup>4</sup> Alexis de Tocqueville, *Democracy in America* (Arthur Goldhammer trans., The Library of America 2004) (1835), 313.

<sup>5</sup> On this distinction, see Ilya Somin, “Jury Ignorance and Political Ignorance,” *William and Mary Law Review* 55 (2014): 1167–93, 1171–77.

## **PART I**

# **THE URGENT NEED FOR ELECTORAL REFORM TO BOLSTER A KEY GUARDRAIL OF DEMOCRACY**

The events leading up to Inauguration Day 2021 posed a sort of stress test for America's republican institutions. The lessons of this brush with constitutional extremity should inform proposals for overhauling the nation's electoral institutions. Reforms that shore up what we can now see as critical weaknesses deserve high priority; proposals that might open up new risks of constitutional crisis are unlikely to be right for the moment.

To recapitulate: an incumbent president refused to acknowledge his electoral defeat, spun a web of groundless speculation and outright untruth to challenge the outcome, and launched a vain effort to overturn the result. He and his supporters put various actors—the vice president, state election officials and legislators, members of Congress—under great pressure to stray from their legally and constitutionally prescribed roles and duties. Most of them resisted that pressure. But will the lines hold next time?

## **HOW INSTITUTIONS PERFORMED UNDER STRESS**

To start with the best news: the federal judiciary, including judges appointed by President Trump, rapidly and efficiently sorted through the claims of Trump and his allies, and rejected nearly all. Vice President Mike Pence, likewise, held to his constitutional oath, counted states' properly certified, and submitted electoral votes. State election officials generally held their ground in the face of Trump's extraordinarily irregular interventions aimed at getting them to "find" more votes for him. Here and there, as with members of a Michigan canvassing board, there was slippage, but things did not get to a point of say, defiance of court orders.

Did state legislatures fail? The fairest answer is that they did not. They too were a major target of Trump's irregular attempts to get lawmakers to meet after Election Day to throw out the result, a ploy that would have been of no lawful effect. While a scattering of state lawmakers were willing to go along with this wild scheme, in no chamber of any state legislature did such attempts come close to success.

## **A POPULAR DISTEMPER**

Among institutions that proved most wobbly under stress were, ironically, a couple of those with the strongest claim on national majoritarian legitimacy: the President's own executive branch and the U.S. House of Representatives.

Of the executive branch, little need be said. The Joint Chiefs found it advisable to state that the military would not cooperate in certain measures being floated in circles near the President. It took the threat of mass resignations to fend off improper White House orders directed at the U.S. Department of Justice.

At the other end of Pennsylvania Avenue, only six of 100 senators joined in objection when a spurious challenge was made to Arizona's count. In the House of Representatives, by contrast, 139 of 435 members voted against certifying at least one state, an outright majority of the 212-member Republican caucus.

Behind these behaviors was an unlovely fact: a majority of the GOP base had in fact been willing to tag along with Trump's claims of a stolen election, and the House, as the assembly most in touch with public passions, reflected this.





## PARTISAN DISTRACTIONS IN CONGRESS

You'd think the events of those months would have sobered up discussions of election reform. "After the 2020 presidential election, the peaceful transfer of power can no longer be taken for granted," University of Chicago law professor [William Baude has noted](#). Experts can argue all day about whether states should be required to adopt same-day registration, ballot lockboxes, and so forth. "But all of those ballots are wasted paper unless the winner takes power and the loser does not."

Instead, 2021 was a lost year for effective electoral reform. Following the unsuccessful impeachment of President Trump over his election conduct, Congress's Democratic leadership, with only a thin edge in numbers over the Republicans, spent much of the year agitating voting themes and reforms that appealed to its own base, but had virtually no connection to the events still fresh in memory, nor any appeal to Republican moderates.

Grandly billed as the For the People Act, the main omnibus package was promoted with sensational claims of voter suppression—again not of obvious relevance to the very-high-turnout election just past—and was sufficiently maximalist in its objectives as to ensure that not a single Republican would cross over to support it.<sup>6</sup>

The chief short-term goal in election reform should instead be to learn from and implement the lessons of late 2020 and early 2021. That should mean strengthening, where possible with bipartisan buy-in, the institutions that secure the peaceful electoral transfer of power. Especially vital is to curb the risk of a succession crisis: a situation in which more than one candidate can lay claim to legitimate control of the government, with support from a faction of the public large enough to promise trouble. On the procedural side, that should mean measures to shore up both the legal and the factual certainty and transparency of election outcomes. On what you might call the cultural side, that should include de-escalation of the sort of talk by which political factions demonize their opponents and, in time, come to view their election wins, or even their participation in politics, as illegitimate.

## PRESCRIPTION: HEADING OFF IRREGULAR EXECUTIVE ACTION

In the final weeks of Trump's administration, some of his well-placed supporters suggested he invoke the powers of the Insurrection Act or declare martial law to hold off the march toward a Biden inauguration. Trump himself is known to have asked cabinet departments to explore whether he might have power to order voting machines seized nationwide. If some of his advisers got their wish, that scheme might have been followed by an attempt at do-over votes in close states.

The American president does not in fact have lawful power to do these things. Congress has made it a crime for federal troops or officers to interfere with the right to vote. Nor does the military follow unlawful orders. "There is no role for the U.S. military in determining the outcome of an American election," Army Secretary Ryan McCarthy and Chief of Staff Gen. James McConville [said in a joint statement](#) following suggestions of such action by Michael Flynn, Trump's first national security adviser.

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<sup>6</sup>Walter Olson, "The Dos and Don'ts of Defending Democracy," Cato Policy Report, Nov./Dec. 2021, <https://www.cato.org/policy-report/november/december-2021/dos-donts-defending-democracy>; Walter Olson, "'Partly Constitutional' Isn't Enough: Senate Should Reject the 'For the People Act,'" *National Review*, May 13, 2021, <https://www.nationalreview.com/2021/05/partly-constitutional-isnt-enough-senate-should-reject-the-for-the-people-act/>.



Nor do the limited powers given the President by the Insurrection Act extend to overriding conventional legality or imposing martial law under ordinary circumstances, as Supreme Court [precedent](#) has made clear. An executive decree ordering the seizing of voting machines would have been met by a court injunction.

Still, this makes an exceptionally apt time to revisit and tighten laws that Presidents might invoke to authorize arbitrary action. Presidents have long used emergency powers to bypass ordinary restraints, and reining in these powers, and the power to declare an emergency to begin with, as [Gene Healy has also noted](#), would make a fine place to start in shoring up the rule of law.

## PRESCRIPTION: ELECTORAL COUNT ACT REFORM

Quite appropriately, the events of January 6 prompted strong interest in tightening up the confusing and poorly written Electoral Count Act (ECA) of 1887, which lays out rules for Congress's handling of certified electoral votes following a presidential election. The law was passed as a response to the ultra-contentious 1876 Hayes-Tilden contest a decade earlier, in which states had sent conflicting slates of electors to the Capitol.

As a bit of background, the Constitution gives state legislatures broad authority over the method of selecting presidential electors. All have chosen popular election, a fact that is unlikely to change. Whatever the method, they must choose it beforehand by process of law: Election Day marks the time of elector selection, foreclosing further discretionary action should the leadership of a state be discontented with the outcome.

Congress's proper role under the Constitution is the limited one of ruling on whatever disputes might arise about the submitted certifications themselves, such as indications of erroneous dates or names, or, if multiple slates are submitted, resolving which certificate authentically speaks for the government of the relevant state.

Because the 1887 ECA does not exhaustively define proper grounds for objections, partisans in Congress have sometimes sought to use the occasion to re-litigate the underlying election, a wrongful claim of authority that usurps the proper role of the states. Clarification is also needed regarding an exception that permits state legislatures to devise methods for later selection if the balloting held on Election Day has "failed." That exception was formerly used to permit a few states to provide for run-offs should no presidential candidate achieve a majority, and it might also be relevant in some cases of elections pre-empted by a hurricane or similar disaster. Beyond that, ECA revision should place a number of further points beyond any possible doubt, such as that a vice president does not have discretion to reject duly certified electoral slates.<sup>7</sup>

## PRESCRIPTION: SEEK TO INCENTIVIZE CONCESSION

Declining public confidence in the results of elections has been a secular trend in America, and it would be a mistake to view the unique personal qualities of the forty-fifth President, who throughout his career has regularly cried fraud and rigging after losing contests, as the sole driver.

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<sup>7</sup> For more see Walter Olson, "Congress Should Clarify The Electoral Count Act Of 1887," *Cato at Liberty* blog, June 29, 2021, <https://www.cato.org/blog/congress-should-clarify-electoral-count-act>; Andy Craig, "What Changes Should Be Made to the Electoral Count Act?," *Cato at Liberty* blog, Jan. 12, 2022, <https://www.cato.org/blog/what-changes-should-be-made-electoral-count-act>.



In popular liberal circles, there was much interest in wild speculation that Diebold voting machines had delivered Ohio to George W. Bush in 2004. Following the 2016 election, a significant share of Democratic voters polled credited an evidence-free theory that Russians had managed to tamper directly with actual voting machine tallies, and not merely indirectly through WikiLeaks influence operations, [to sway the election](#). As for Republicans, oral tradition among the party base has long deemed big-city Democratic machines capable of tampering elections if given half a chance, notwithstanding indications that such goings-on have grown far less common than they might once have been.

Timely and gracious acknowledgment of an election loss is an indicator of a healthy democratic culture. Why has it been in retreat lately?

As [has been noted](#), several incentives, some of them distinctly contemporary, can encourage non-concession. Especially in a high-visibility race, refusal to concede can rally supporters' morale and help turn a transient contest for electoral office into a permanent "campaign"; hold onto news media attention that might otherwise dissipate; reinforce an image as one "who fights"; and, not incidentally, pull in what can be quite a rewarding flow of small-dollar donations. All this is on top of the natural human psychological reasons not to concede. To be sure, there is always a contrary incentive to appear reasonable in the eyes of an imagined impartial observer. But if nearly everyone paying attention to politics has turned into a partisan, that may not count for much.

Many of these problems are beyond the reach of policy as such. But states often do structure financial incentives so as to influence the choice, as with rules providing that candidates must put up the cost of recounts when the reported margin of victory exceeds a stated margin.

## PRESCRIPTION: COUNTER DISTRUST WITH A CREDIBILITY AGENDA

Election administration at all times calls for methods that are secure against fraud and bad practice; the current moment calls for methods that are also visibly so. If diners with or without reason have become distrustful of a restaurant's food, you might consider switching to a floor design in which they can see the kitchen.

Some steps in this direction, such as requiring a paper record for each ballot, are now largely uncontroversial. States should consider [strengthening efforts](#) to make voter rolls accurate, including an existing clearinghouse allowing states to compare voter registration databases to catch moves and the like with other member states. Audits are [already widely](#) in use and could be [strengthened further](#).

One measure that could be particularly valuable is for states to facilitate and, where appropriate, mandate local reporting of complete or near-complete counts on Election Night. Following its embarrassing stint in the national spotlight during the 2000 litigation, Florida put a bipartisan effort into [getting things right](#), and on election night 2020 its local authorities reported results promptly. The resulting outcome was clear from early on and [attracted little controversy](#).

There is a genuine national, as well as within-state, interest in making sure that counts do not stretch into multiple days. In some states that refused to make provision for advance partial processing of mailed ballots, Election 2020 results tended to arrive in two widely separated waves, the first for in-person same-day votes, which tilted heavily Republican, and the second for early and mail votes. The resulting pattern of an early Trump lead, later overcome by Biden, fed claims that someone or other must have engaged in overnight "vote dumps," which proved resistant to evidence-based correction.



## PRESCRIPTION: STOP DELEGITIMIZING INSTITUTIONS

One reason the public might lose confidence in public institutions is that it has regularly heard high public figures assail their legitimacy.

Donald Trump, as usual, ranks top in class: Orin Kerr of Berkeley [has observed](#) that his “trademark move” is to attack any institution that gets in his way as illegitimate and corrupt. But he’s not alone. President Joe Biden [saw fit to attack](#) as “Jim Crow on steroids” a bland, middle-of-the-road Georgia bill that laid out election procedures fairly permissive by nationwide standards. Others assail as purposeful “voter suppression” the sorts of voter ID laws that large majorities of Americans support, including both Democrats and nonwhites, and which appear to have no detectable effects on turnout, minority or otherwise (and no detectable effects on fraud either).<sup>8</sup>

Another target of perennial delegitimization are such less-than-majoritarian institutions as the Supreme Court, the U.S. Senate with its disparities in geographic representation, and of course the Electoral College. And it is indeed true that all three of these institutions are flawed to some extent, and might be redesigned to work in different and perhaps better ways.

Still, when it came time for each of these three institutions to play its role in the January 2021 tensions, two things mattered. The first was that the institutions worked as intended and resisted extralegal demands. The second is that most of the public, fortunately, had not bought into the portrayal of these institutions as illegitimate.

## PRESCRIPTION: WORK WITH AMERICA’S FEDERALIST GENIUS

The Framers largely left responsibility for elections to the states and localities. The Electoral College mechanism is devised so as to hold to a minimum the influence of the capital on the selection of the president. States are given the lead in regulating elections for the House and Senate, although the Election Clause empowers Congress to regulate the manner of election by law. (Laws passed by Congress currently mandate single-member districting and [formerly prescribed compactness](#) in districting, with an eye to curbing gerrymandering; it would be a good idea to [revive and strengthen](#) the latter standards.)

True, amendments to the Constitution as well as implementing legislation have added crucial national-level constraints of equal protection and noninfringement of the right to vote on the basis of race and sex. Still, election administration in America remains highly decentralized, relying on armies of little-heralded local officials, community volunteers and election judges. Even within a single state, there may not be uniformity between one county or city and the next as to which voting machines to use, or how to handle a question like that of “curing” ballots by accepting corrections on incidental mistakes.

While it’s often seen as the progressive position to favor more central coordination of election rules from Washington, there are at least two big reasons to hesitate before going too far in that direction.

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<sup>8</sup> Enrico Cantoni, Vincent Pons, “Strict Id Laws Don’t Stop Voters: Evidence from a U.S. Nationwide Panel, 2008–2018,” *Quarterly Journal of Economics*, Vol. 136, Issue 4, Nov. 2021, <https://academic.oup.com/qje/article-abstract/136/4/2615/6281042?login=false>; Walter Olson, “Do Voter ID Laws Matter Much?,” *Cato at Liberty* blog, Aug. 16, 2021, <https://www.cato.org/blog/do-voter-id-laws-matter-much>.





One is the practical value of decentralization in supporting resilience. Because innovations tend to be adopted piecemeal, the inevitable problems new methods bring can be sorted out by early adopters with less risk of mass failure. The newly introduced voting machine doesn't have to cause havoc everywhere at once; other localities can learn from New York City's difficulties in implementing ranked choice voting on its first time out.

But those are secondary benefits compared to the big one: there's no Washington official or agency that can grab hold of the process. By not entrusting the running of elections to a single central agency, we have avoided the danger that economist [Steven Landsburg](#) calls "centralizing the power to decide who will yield power."<sup>9</sup>

Schemes that appear to involve just a little federalization can lead by stages to a lot of it. The ever-popular idea of replacing the Electoral College with direct popular vote, for example, would inevitably be followed by discussions of why standards for voting eligibility and tabulation that undergird a single combined count should be permitted to vary so widely from one state to the next. Recommendations for homogenization might issue from whatever federal body had been charged with supervising the combined count. Furthermore, even if the first appointees named to such an agency were above politics, later ones might not be. An established point of power in Washington, D.C. is a point that can be put under pressure.

Another superficially tempting, but ultimately wrongheaded, target for federal intervention is to intervene in the selection, retention, and removal of state and local election officials. Some have proposed a federal law forbidding states or localities from removing election officials without good reason, with rogue governors or mayors in mind. Such a measure is in good part redundant, since it's already common for states on their own to have a removal standard of good cause. Worse, it's far from clear that it would improve the ratio of honest to rogue elements in election administration. Election officials facing dismissal will predictably invoke the new federal right to go to court. Yet some election officials do need to be removed on legitimate grounds such as incompetence or malfeasance, and giving them legal leverage to stay on the job longer will make the election experience worse. The last thing we should want is a new federal law billed as keeping rogue states from removing honest election administrators that winds up keeping honest states from removing rogue election administrators.

## PRESCRIPTION: DON'T TRY TO BAN MISINFORMATION

Few would deny that misinformation can harm the workings of the electoral process. Opinions vary as to whether popular misinformation and its spread was a greater or lesser blight [in earlier eras](#), but it seems likely that the rise of the Internet and the decline of trust in legacy media have helped accelerate some types of misinformation spread that in themselves are not new.

In interpreting election results, as elsewhere, the Internet can in a matter of hours promote amateur outsiders doing their own research into powerful mass engines of erroneous belief. Credentialed experts may express frustration at this, but they can be dismissed as an out-of-touch elite.

And yet none of this means that government is or should be free to repress or punish the private circulation of political or electoral misinformation. It is true that some kinds of false speech lack First Amendment protection

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<sup>9</sup> Walter Olson, "The Framers Wisely Left Election Practice Decentralized," *Cato at Liberty*, Dec. 3, 2020, <https://www.cato.org/blog/framers-wisely-left-election-practice-decentralized>.



under our law, including commercial fraud and personal defamation. But it is not the falseness as such that makes the speech lose protection. Quite the contrary: the Supreme Court has made clear that most false speech remains protected, most especially speech on matters of public concern.<sup>10</sup> There is no First Amendment loophole that permits a ban on “fake news.”

Critics were right for this reason to look askance at a state-level bill proposed by Washington Governor Jay Inslee to ban untruthful statements by candidates about elections that undermine trust in ways likely to stoke violence. The bill did gesture in the direction of some existing doctrinal limits on the First Amendment, including the “incitement” and “true threat” exceptions. But neither of these applies when the danger is neither imminent and proximate on the one hand, nor coordinated by the speaker on the other. “This election was stolen and if it stands, we’re not going to have a country any more,” is generally protected speech for the same reasons that “Capitalism is killing the working class and nothing but a revolution will save us” is generally protected speech.

In fact, history teaches that empowering government with stronger levers against political misinformation is likely to provide incumbents and establishments a handy means to curb and marginalize peaceful challenges from radical, outsider, and opposition thinkers.

It’s true that everyone active in public life has a basic intellectual responsibility to help in holding back the inflow of misinformation. But the effort to do so leads quickly to difficult and sensitive questions of application. Those include distinguishing between graver sins such as lying or “disinformation” on the one hand, and the more venial and perhaps forgivable set of lapses arising from mistaken belief, speculation, and the natural human penchant for exaggeration and metaphor. Rendering an impartial assessment of who ought to be silenced is particularly difficult when the misinformation has been spread by our friends (or, worse yet, ourselves) or on behalf of some cause that we consider good. For all these reasons, government must not be allowed to wield coercive powers as arbiter or inquisitor of private discussion and belief. To the extent that there is a need for persuasive rebuttal of popularly circulating falsehoods, it should be led by private debate participants independent of government direction.

It will of course be legitimate across a wide range of circumstances for the government to speak truthfully about its own programs, whether they be vaccine schedules or voting machine methods; and accurate information, conveniently presented, may indeed go some distance to correct public misinformation. Thus it need not threaten private liberty for a state actor to direct public attention to the integrity checks that guard against election misconduct, or work to educate interested parties (such as locally active political volunteers) about the mechanics of vote tabulation and the like.

On this topic, however, we should not expect easy short-term nostrums. There was already in both parties, as of 2020, a seasoned corps of election-watchers trained to tease out from surface random variations in vote counts the sorts of anomalies in geography, volume, or timing that might signal genuinely suspicious goings-on. Promoters of popular “Stop the Steal” hysteria simply bypassed and ignored this existing corps of fraud-detection experts, uninterested in what they might have to say.

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<sup>10</sup> *United States v. Alvarez*, 567 U.S. 709 (2012).

## PRESCRIPTION: AVOID INNOVATIONS THAT INVITE SUCCESSION CRISES

Taking seriously the need for determinate and legible electoral outcomes means being willing to apply close scrutiny to some widely lauded reform ideas that would head us in the opposite direction.

Consider, for example, proposals to replace the Electoral College with direct popular election of the president. With careful forethought and planning—as well as the use of the constitutional amendment process—this might well be done in such a way as to keep to a minimum the scenarios in which two candidates might each advance a plausible claim to have won. Of course, as we know from cliffhangers like those in 1876 (Hayes-Tilden) and 2000 (Bush-Gore), the Electoral College construct itself is by no means immune to this danger. Defenders of the venerable institution nonetheless point out that for all its flaws, it generally holds to a handful the number of states where the vote is close enough to justify recounts or litigation.

By contrast, a tight national popular vote, decided by a margin of, say, 100,000 votes, would trigger a nationwide search for smudges on ballots, procedural quibbles, long-shot theories as to how this or that state's law should be applied, and so forth. Failure to lay to rest suspicions about ballot integrity in any region or large state, even or especially if the votes in those places were not themselves close, might be enough to torpedo losers' trust in the outcome.

These challenges presumably have solutions, even at the likely price of some centralizing tendency. After all, France and other advanced countries use national popular votes for presidential selection and other purposes. What by contrast is unacceptably shoddy and indeterminate is the gimcrack substitute known as the National Popular Vote Interstate Compact (NPVIC).

The NPVIC's premise is that states constituting a majority of the electoral votes will band together by each passing identical legislation agreeing to award their electoral votes to whichever candidate wins the national popular vote.

But as Cato's Andrew Craig has demonstrated, bringing NPVIC into legal force would tend to engender dangerous indeterminacy and uncertainty, because the drafters of the compact did not see fit to include workable definitions of what would get calculated and when in a national popular vote, nor any dispute resolution mechanism in case of disagreement.<sup>11</sup>

The NPVIC simply takes it for granted that all states report their popular votes in a tidy and readily comparable fashion. Honest disputes are very likely to arise: "an invitation to a constitutional crisis [and] high-stakes catastrophe." Various bills in Republican state legislatures further propose that, to cite language about one that passed the North Dakota Senate, "their state will withhold its popular vote totals for president until after the Electoral College has voted in December."<sup>12</sup>

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<sup>11</sup> Andy Craig, "The Fatally Flawed National Popular Vote Plan," *Cato at Liberty*, Nov. 17, 2021, <https://www.cato.org/blog/fatally-flawed-national-popular-vote-plan>. As Craig notes, Alabama in 1960 used an unusual arrangement in which neither Kennedy's nor Nixon's name appeared directly on the ballot, and votes could be cast for individual electors, some of whom were unpledged. The result was that some tabulations showed Kennedy winning the national popular vote and others Nixon, depending on how to interpret the Alabama outcome.

<sup>12</sup> *Ibid.*



## CONCLUSION: BE ON GUARD, BUT TURN DOWN THE TEMPERATURE

Election administration is an imperfect art at best with plenty of genuine tradeoffs. We should refrain from treating everyday disagreements as attempts to “rig” results or deprive others of the franchise.

Libertarians can play a constructive role in this conversation, with their particular attachment to the rule of law, constitutionalism, checks and balances, and limitations on government power in general. They also have an understanding and well-earned fear of what government is likely to turn into once an administration knows that voters cannot turn it out of office.

America has weathered election crises before, and it can get past this one.

## PART II

### FOOT VOTING AS A GUARDRAIL OF DEMOCRACY<sup>13</sup>

In addition to short-term challenges relating to attempts to overturn election results, American democracy faces three interlocking long-term challenges, as well. The first is the powerlessness of individual citizens in determining what policies they wish to live under. Particularly in national elections, individual voters have only an infinitesimal chance of affecting the outcome. This state of affairs also gives voters little if any incentive to seek out information in order to make well-informed decisions, and has exacerbated bias in the evaluation of political information.

Second, government has become so large and complex that even relatively well-informed voters often find it virtually impossible to keep track of more than a small fraction of its activities. As a practical matter, many government policies have become the preserve of elites, with little in the way of informed oversight from voters.

Finally, there is the dangerous polarization, and growing partisan bias and hostility. Increasingly, right and left not only oppose each other on policy, but view the other side as a menace to the republic. There is no one fool-proof solution for these problems. But all three can be greatly mitigated by empowering Americans to “vote with their feet” to a greater extent than is now the case.

People can vote with their feet through international migration, by choosing what jurisdiction to live in within a federal system, and by making decisions in the private sector, such as choosing which school to attend or deciding to live in a private planned community. In each case, the key is that an individual person can make a decisive choice, as opposed to casting just one vote out of many millions, as in an election.

## ENHANCING POLITICAL CHOICES

Most people believe ballot box voting is the ultimate expression of political freedom. But ballot box voting has two serious weaknesses: individual voters have almost no chance of affecting the outcome of an election, and for that very reason they have little incentive to make well-informed decisions.

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<sup>13</sup> Parts of this section are adapted, with permission, from Ilya Somin, “Voting With Our Feet,” *National Affairs*, Fall 2021, <https://nationalaffairs.com/publications/detail/voting-with-our-feet>.



The odds that an individual vote will make a meaningful difference are miniscule: about 1 in 60 million in a presidential election, for example.<sup>14</sup> Your chances are somewhat higher in a swing state, but lower if you do not. The odds are better in elections for state or local offices, but still very low.

Effective freedom requires the ability to make a decisive choice. For example, a person does not have meaningful religious freedom if she has only a 1 in 60 million chance of being able to determine which religion she wishes to practice. Even a 1 in million or 1 in 100,000 chance (the odds of casting as decisive vote in some smaller elections) is far too low. Similarly, a person with only an infinitesimal chance of affecting what kind of government policies he or she is subjected to has little, if any, genuine choice.

The near-powerlessness of individual voters also incentivizes them make little or no effort to become informed about political issues. Surveys consistently show that voters are often ignorant even about basic aspects of the political system and government policy. For example, only about a third can even name the three branches of government: executive, legislative, and judicial.<sup>15</sup> This is not because voters are stupid, but because they are “rationally ignorant,” as economists put it. For most people, there is little payoff to becoming well-informed about government and public policy. For that reason, most Americans quite rationally prefer to devote their time and attention to other things.

Perhaps even worse, voters also have incentives to be “rationally irrational” — to do a poor job of evaluating the political information they do have.<sup>16</sup> If a vote has only a tiny chance of making a difference, there is little incentive to control our cognitive and partisan biases when assessing opposing candidates and policies. This helps explain why studies consistently show voters are highly biased in evaluating political information, often to the extent of believing ridiculous conspiracy theories that conform to their biases, such as Republican voters’ widespread belief that the 2020 election was “stolen” from Trump by voter fraud, a belief shared by some 77% of Trump supporters in the immediate aftermath of the election, and comparable numbers since then.<sup>17</sup> Left-of-center voters are prone to similar biases of their own, including even such extreme cases as 9/11 “trutherism” — the belief that the Bush Administration knew about the 9/11 attacks in advance and deliberately allowed them to happen.<sup>18</sup> These tendencies towards biased evaluation of information are widespread among voters on both sides of the political spectrum.<sup>19</sup>

Voting is not the only mechanism of traditional political participation. Some can also try to influence government policy by engaging in political speech, lobbying, campaign contributions, demonstrations and political activism. But opportunities for such participation “beyond voting” are highly unequal, with only an estimated 25% of Americans

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<sup>14</sup> Andrew Gelman, Nate Silver, and Aaron Edlin, “What Is the Probability That Your Vote Will Make a Difference?” *Economic Inquiry* 50 (2012): 321–26. For more detailed discussion of this and alternative methods of estimating the odds that a vote might be decisive, see Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter*, rev. ed. (Stanford, CA: Stanford University Press, 2016), 75–79.

<sup>15</sup> See data in Somin, *Democracy and Political Ignorance*, 20.

<sup>16</sup> *Ibid.* 92–97.

<sup>17</sup> Ilya Somin, “Perils of Trump’s Conspiracy-Mongering About the Election,” *Reason*, Nov. 11, 2020, <https://reason.com/volokh/2020/11/21/perils-of-trumps-conspiracy-mongering-about-the-election/>. Polls taken in more recent months shows similar results.

<sup>18</sup> Somin, *Democracy and Political Ignorance*, 99–100.

<sup>19</sup> For a recent overviews of the evidence indicating widespread bias among voters on both left and right, see, e.g., Peter H. Ditto et al., “At Least Bias Is Bipartisan: A Meta-Analytic Comparison of Partisan Bias in Liberals and Conservatives,” *Perspectives on Psychological Science* 14 (2019): 273–291.





engaging in it at all.<sup>20</sup> Those who do so effectively enough to have more than minimal influence are a much smaller group.

The problems of rational ignorance and rational irrationality are exacerbated by the enormous size, scope, and complexity of modern government. Between them, federal, state, and local governments spend almost 38% of GDP, and regulate almost every type of human activity.<sup>21</sup> This makes it very difficult for voters to keep track of more than a small fraction of government activity, and to hold officials accountable for their performance.<sup>22</sup>

Some scholars argue that rationally ignorant voters can nonetheless effectively monitor modern government by utilizing a variety of information “shortcuts” or by relying on the so-called “miracle of aggregation,” under which errors made by ignorant or biased voters happily cancel each other out. Elsewhere, one of us has criticized such theories in detail. Here, we note only that effective use of shortcuts itself often requires preexisting knowledge that most voters do not have, that poor use of shortcuts can often actually exacerbate flaws in decision — and that “miracle of aggregation” theory depends heavily on the (largely false) assumption that voter errors and biases are randomly distributed.<sup>23</sup>

Things are very different when people “vote with their feet.” When you decide what jurisdiction to live in, that is a decision you have real control over. That in turn creates strong incentives to seek out relevant information. The same applies to private-sector decisions, and choices about international migration. If you are like most people, you probably devote more time and effort to deciding what television set or smartphone to buy, than to deciding who to vote for in any election. The reason is not that the television set is more important than who governs the country, but that the decision about the TV has real effects. This intuition is backed by both historical evidence and laboratory experiments indicating that people faced with “foot voting” decisions seek out greater information and evaluate it more rationally than those assessing political information for use at the ballot box.<sup>24</sup> Therefore, if we want to give people meaningful political choice and incentivize them to make informed decisions, we must expand opportunities for them to vote with their feet.

Foot voting in federal systems is the most familiar type. Choosing between states and localities has historically offered valuable opportunities for political choice, and can be expanded today.<sup>25</sup> Foot voting in the private sector is a less familiar idea. Nonetheless, it is an important phenomenon. Private organizations of various types offer a wide variety of services traditionally associated with regional and local governments — the most significant examples are private planned communities, such as condominiums and homeowners’ associations provide services such as environmental amenities, garbage disposal, education, and security. Almost 74 million Americans [lived in such private communities](#), as of late 2019. That figure undermines claims that private communities are just a tool for the very wealthy to wall themselves off from the rest of society.

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<sup>20</sup> Jennifer Oser, Jan Leightley, and Kenneth Winneg, “Participation, Online and Otherwise: What’s the Difference for Policy Preferences?,” *Social Science Quarterly* 95 (2014): 259–77.

<sup>21</sup> Somin, *Democracy and Political Ignorance*, 160–61.

<sup>22</sup> For a more detailed discussion of these issues, see *ibid.*, pp. 160–63.

<sup>23</sup> For an overview and critique of numerous shortcut and “miracle of aggregation” theories, see Somin, *Democracy and Political Ignorance*, ch. 4.

<sup>24</sup> For summaries of the evidence and relevant citations, see: *ibid.*, ch. 5.

<sup>25</sup> Somin, *Free to Move*, ch. 2.

As a source of foot-voting opportunities, private communities have important advantages over traditional state and local governments. One big one is lower moving costs: a given area can fit many more private communities than political jurisdictions. As a result, it is often possible to move from one to another without giving up jobs, family connections, or other opportunities. Another benefit of private communities is that the services they provide are often better-quality than those offered by the state.<sup>26</sup>

Private planned communities are far from the only form of private-sector foot voting. There are many other ways in which the private sector can compete to provide services traditionally associated with state and local governments. One prominent example is school choice. Various studies show that private schools provide better educational services than public equivalents, even when controlling for the socioeconomic background of students and other similar variables. In addition, competition from private schools under voucher programs leads to improvement by public schools in the same areas.

Private-sector foot voting cannot fully replace government services. But much can still be done to expand its scope, including making it easier to establish private planned communities, and expanding school choice programs. The same goes for promoting other private alternatives to government services.<sup>27</sup>

Many foot voting decisions are made based on seemingly “economic” considerations related to jobs and housing. This may make it seem as if they are not truly a mode of “political” choice. But economic conditions and job opportunities are often heavily influenced by government policies on taxation, employment, and other issues. Even if you vote with your feet purely based on “economic” considerations, that is often still a political choice, as well.

## FOOT VOTING AS A TOOL FOR ENHANCING POLITICAL CHOICE FOR THE DISADVANTAGED

Foot voting can expand political choice for all classes of society. But, throughout American history, it has been an especially vital outlet for the poor and the oppressed. Perhaps the best-known example is the movement of millions of African-Americans from the Jim Crow-era south to the north and West, where they benefited from greater opportunity and relatively much lower levels of racial discrimination. Others include the movement to the Western states in the nineteenth and early twentieth centuries. In more recent times, foot voting has been a boon to gays and lesbians seeking more tolerant states and localities.<sup>28</sup>

The history of immigration is also a dramatic example of how foot voting is a massive boon for the poor, the disadvantaged, and the oppressed. The vast majority of Americans are either immigrants themselves, or descendants of those who came here fleeing poverty and oppression elsewhere.

This history undercuts oft-heard claims that foot voting is of use primarily for the affluent. To the contrary, its greatest beneficiaries are at the opposite end of the socioeconomic spectrum.

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<sup>26</sup> See discussion in Somin, *Free to Move*, ch. 4.

<sup>27</sup> For a review of relevant studies, finding that 20 of 21 conclude that there are positive effects, and one finding no effects, see Anna J. Egalite, “Measuring Competitive Effects from School Voucher Programs: A Systematic Review,” *Journal of School Choice* 7 (2013): 443–64. See also Dennis Epple, Richard E. Romano, and Miguel Urquiola, “School Vouchers: A Survey of the Economics Literature,” *Journal of Economic Literature*, 55 (2017): 441–62, 475–78.

<sup>28</sup> For a more detailed discussion of the historical evidence, see Somin, *Free to Move*, 47–48.



Foot voting is also of special importance for the poor and disadvantaged because they are less able than the more affluent to wield political influence in other ways. Data compiled over several decades suggests that politicians are less responsive to the views of the poor than those of more affluent voters, and that the former have lower levels of political knowledge.<sup>29</sup>

## BREAKING DOWN BARRIERS TO FOOT VOTING

Over the last several decades, foot voting in America has become more difficult and more costly, especially for the poor and disadvantaged, who have the most to gain from expanding opportunities.<sup>30</sup> Fortunately, much can be done to alleviate these obstacles.

The single biggest problem is the rise of exclusionary zoning, which makes it difficult or impossible to build new housing in response to demand. If people cannot afford to live in areas with economic and social opportunities, they will remain locked out from them — often trapped in failing communities where it is difficult to escape poverty.

A well-known 2019 article by economists Chang-Tai Hsieh and Enrico Moretti found that, if restrictions on housing construction in several major cities with especially harsh zoning were reduced to those of the median U.S. city between 1964 and 2009, U.S. GDP in 2009 would have been about 8.9% higher than was actually the case.<sup>31</sup> However, as Hsieh and Moretti graciously acknowledged, economist Bryan Caplan found that they made calculation errors that actually greatly understate the size of this effect.<sup>32</sup> After correction, it turns out that GDP in 2009 would have been a remarkable 14 to 36% higher than it actually was.<sup>33</sup> The urgent need for zoning reform is widely agreed on by economists and housing policy experts across the political spectrum, ranging from free market economists such as [Edward Glaeser](#) of Harvard to left-liberals such as [Paul Krugman](#).<sup>34</sup>

Although not as severe as the impact of zoning, state-by-state occupational licensing also greatly reduces mobility, and undercuts foot voting. A 2017 [study sponsored by the National Bureau of Economic Research](#) found that people in occupations with state-level licensing are 36% less mobile between states than those in other fields. Licensing has expanded to the point where [some 30% of American workers](#) need licenses to be able to do their jobs. The evidence also suggests that most of these laws do far more [to suppress competition](#) than protect consumers.

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<sup>29</sup> See, e.g., Martin Gilens, *Affluence and Influence* (Princeton, NJ: Princeton University Press, 2012).

<sup>30</sup> For evidence of decreasing mobility in the United States, especially among the poor, see David Schleicher, “Stuck! The Law and the Economics of Residential Stability,” *Yale Law Journal* 127 (2018): 78–154, 81–86 (summarizing relevant studies); Greg Kaplan and Sam Schulhofer-Wohl, “Understanding the Long-Run Decline in Interstate Migration,” *International Economic Review* 58 (2017): 57–94; Raven Molloy, Christopher L. Smith, and Abigail Wozniak, “Internal Migration in the United States,” *Journal of Economic Perspectives* 25 (2011): 173–96

<sup>31</sup> Chang-Tai Hsieh and Enrico Moretti, “Housing Constraints and Spatial Misallocation,” *American Economic Journal: Macroeconomics* 11 (2019): 1–39.

<sup>32</sup> Bryan D. Caplan, “Hsieh-Moretti on Housing Regulation: A Gracious Admission of Error,” *Econlog*, Apr. 5, 2021, <https://www.econlib.org/a-correction-on-housing-regulation/>.

<sup>33</sup> *Ibid.*

<sup>34</sup> For a recent overview of the wide range of cross-ideological agreement among experts, see Ilya Somin, “A Cross-Ideological Case for Ending Exclusionary Zoning,” *Reason*, Apr. 28, 2021, <https://reason.com/volokh/2021/04/28/a-cross-ideological-case-for-ending-exclusionary-zoning/>.



In recent years, such states as [Arizona](#), [Ohio](#), [Florida](#), and [Pennsylvania](#) have enacted valuable licensing reforms. But much remains to be done on that front. There has also been some important progress on reducing zoning in several parts of the country.<sup>35</sup> But, here too, much more needs to be done.

Another major obstacle to expanding foot voting opportunities is the increasing centralization of power in Washington, DC. Federal spending currently accounts for [almost 30% of U.S. GDP](#), a figure inflated by relief spending related to the Covid pandemic. But it was an already-high 21% in 2019. Perhaps more importantly, federal regulation now extends to cover almost every major aspect of the economy and society.

People cannot vote with their feet against one-size-fits-all federal policies except by leaving the country entirely, which is usually far costlier than moving from one state or locality to another. We can, therefore, expand foot-voting opportunities by decentralizing government power, leaving more issues to be handled by states, local governments, and the private sector. It would also reduce the information burden on ballot-box voters created by the enormous size and complexity of government.

Not every issue can be decentralized. But there are nonetheless many opportunities to decentralize without losing economies of scale. There are also numerous ways to expand opportunities for foot voting in the private sector. Much can be done to make private planned communities an option available to more people.<sup>36</sup> Similarly, expanded school choice systems can enable more people—especially the disadvantaged—to make use of foot voting opportunities in public education.

## REDUCING POLARIZATION

Much has been written about the dangerous growth of polarization and partisan hostility in recent American history. The 2020 election and its awful aftermath have reiterated the depth of that hostility, and the degree to which many Democrats and Republicans regard the opposing party as not merely wrong, but a menace to the American way of life.

This sorry state of affairs has multiple causes. But one is the enormous growth of federal power, which has increased the number of issues subject to one-size-fits-all centralized policies. In an age where the two major parties are far apart on ideology and policy, many find it increasingly unacceptable to let that power fall into the hands of their political rivals. Such fears are part of the reason why alarmingly high percentages of both Republicans (44%) and Democrats (41%) [told pollsters](#) that violence would be at least “a little” justified if their side lost the 2020 presidential election.

Greater decentralization of power to states, localities and the private sector would not put an end to such fears. But it could significantly reduce them. Decentralization combined with foot voting opportunities could enable more Americans to live under their preferred policies, regardless of who sits in the White House, or which party controls Congress.

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<sup>35</sup> Ilya Somin, “Progress on Exclusionary Zoning, Regression on Rent Control,” *Reason*, Dec. 25, 2019, <https://reason.com/volokh/2019/12/25/progress-on-exclusionary-zoning-regression-on-rent-control/>.

<sup>36</sup> Somin, *Free to Move*, ch. 4.



Some fear that decentralization and expanded foot voting might actually increase political conflict by exacerbating the “Big Sort”: the supposed tendency of people to cluster in communities of the politically like-minded. In a famous 2008 [book of the same name](#), journalist Bill Bishop argued that this trend increases political polarization and our already strong tendency to ignore or dismiss opposing points of view.

This issue cannot be lightly dismissed. Nonetheless, the concern is overblown. One problem with the Big Sort theory is that the data doesn’t seem to support the notion that we are more ideologically segregated than we were several decades ago.<sup>37</sup> A deeper problem with the Big Sort idea is that people who vote with their feet do not in fact tend to make choices that align neatly on a left-right or Red-Blue spectrum. Many are willing to move to jurisdictions that do not match their partisan biases. Red states like Texas have attracted many migrants from liberal states on the East and West coasts, because their [less restrictive zoning rules](#) lead to lower housing costs. In recent years, traditional wariness of racial and ethnic integration among many whites [has declined](#). That further reduces the likelihood that foot voting will result in greater homogeneity.

## CONCLUSION

By empowering more Americans to vote with their feet, we can simultaneously expand political freedom for all, provide an especially great increase in political choice for the poor and disadvantaged, and help alleviate political polarization.

## PART III

### CITIZEN PARTICIPATION IN THE ADMINISTRATION OF CRIMINAL JUSTICE AS A KEY GUARDRAIL OF DEMOCRACY

In the preceding section, we identified complexity, polarization, and a sense of powerlessness as three long-term challenges to American democracy. Another key challenge is the lack of citizen participation in the criminal justice system and the negative effect it has had on the system’s fairness, efficacy, and perceived legitimacy. This is a particular concern in a country that maintains the highest incarceration rate on earth and disenfranchises a correspondingly large number of its citizens via criminal convictions so they may no longer participate in the democratic process.

The Founders were acutely aware that oppressive regimes often use criminal law to exert control, punish dissent, and exact retribution, and they were careful to protect citizens from such abuses. Thus, it is no accident that nearly half the Bill of Rights is devoted to issues of criminal procedure, including particularly the process of adjudicating charges. The most essential feature of that process is the citizen jury, which is the only example of direct democracy in the Constitution and an essential expression of its supermajoritarian design.<sup>38</sup>

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<sup>37</sup> See, e.g., Samuel J. Abrams and Morris P. Fiorina, “The ‘Big Sort’ That Wasn’t: A Skeptical Reexamination,” *PS: Political Science and Politics* (2012): 203–10.

<sup>38</sup> For a thorough discussion of the Constitution’s essentially supermajoritarian design, see John O. McGinnis and Michael B. Rappaport, “Our Supermajoritarian Constitution,” *80 Texas Law Review* (2002): 703. For a discussion of the criminal jury’s role as the most supermajoritarian feature of our supermajoritarian Constitution, see Aliza Plener Cover, “Supermajoritarian Criminal Justice,” *George Washington Law Review* 87 (2019): 875.





Yet despite the central role they were meant to play in our polity, juries are now practically extinct on American soil. As a result, and utterly contrary to the Framers' design, ordinary citizens today have virtually no personal involvement in the administration of criminal justice. Notably, the practical elimination of criminal jury trials was not accomplished through any conscious choice or legislative enactment, but rather through our gradual embrace of so-called "plea bargaining," an informal and largely opaque process for resolving criminal charges that was unknown at the Founding and would almost certainly have been roundly condemned by members of that generation.

This third and final section of the paper describes how criminal law has been used by oppressive regimes throughout history to target enemies and exert social control; how the Founders meant for the criminal jury to serve as a key guardrail against that abuse; how we have heedlessly allowed this indispensable institution to be almost completely eliminated from our system of democratic self-government; and what we can do to resurrect it.

## CRIMINAL LAW AS A TOOL OF OPPRESSION

Throughout history, criminal law has been among the most potent tools available to oppressive regimes to exert social control, instill fear, and exact political payback from perceived dissidents. In a recent piece titled "Was the American Revolution a 'Rich Man's War But a Poor Man's Fight'?" Professor Guy Chet describes how the British "launched an aggressive law-enforcement campaign" against the colonists that included expanding the jurisdiction of royal admiralty courts in order to push more cases out of local court systems and deprive colonial defendants of the jury trials to which they would otherwise have been entitled. As Chet explains, "[t]he scope and vehemence of public protests over this issue are a testament to the level of distress that the denial of jury protection engendered in American communities."

Of course, the use of criminal law as a tool of oppression did not end with the ratification of the Constitution. It continued and extended from the Alien and Sedition Acts of 1798, to the Fugitive Slave Act before the Civil War and the "Black Codes" afterwards, all the way up to recent efforts to enact "anti-riot" legislation that comes perilously—and perhaps unconstitutionally—close to a naked effort to suppress dissent.

## JURIES WERE MEANT TO BE OUR PRIMARY PROTECTION AGAINST THE ABUSE OF CRIMINAL LAW

Acutely aware of the perennial abuse of criminal law, the Founders devoted considerable attention to safeguarding against it. And the mechanism upon which they primarily relied for that purpose was the jury trial. The notion that small groups of ordinary citizens working together in the context of a single prosecution could plausibly constrain an oppressive regime may seem quaint from our modern perspective but that is due in part to the fact that the modern criminal jury has been so hobbled and neutered so that it is, in the words of Akhil Amar, "but a shadow of its former self."<sup>39</sup>

Though it is difficult for many proponents of the status quo to accept, the Founding generation had a much different conception of the criminal jury and its proper role in the polity than most Americans do today. Contrary to the modern misconception of juries as purely fact-finding bodies, early Americans considered them to be avowedly

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<sup>39</sup> Akhil Reed Amar, "The Bill of Rights as a Constitution," *Yale Law Journal* 100 (1991): 1190.



political bodies whose role went well beyond deciding the outcome of particular cases. Thus, Alexis de Tocqueville described the early nineteenth-century jury as “‘first and foremost a political institution’ and ‘a form of popular sovereignty.’”<sup>40</sup> As such, the criminal jury may be thought of both as representing the “lower house” of a bicameral judicial branch<sup>41</sup> and as a kind of “petit legislature” charged with preventing unjust convictions and the imposition of unjust punishments.<sup>42</sup>

Participation in jury service was considered by the Founders to be a fundamental civic activity at least on par with—if not more important than—voting in elections. Unlike their vastly circumscribed role in our current system, “[a]t the time of the Founding, jurors were not mere fact-finders, but equal participants in a constitutional structure of shared power” such that “some Founding Fathers *considered the right to serve as a juror more fundamental to [citizens’] constitutional and political identity than the right to vote.*”<sup>43</sup> So vital was this political function and identity of jurors that Thomas Jefferson said, “‘Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislature.’”<sup>44</sup>

The role of juries in protecting fellow citizens against government oppression was exemplified for colonial-era Americans by the [trial of newspaper publisher John Peter Zenger](#), who was prosecuted for the crime of committing seditious libel against the royal governor of New York, William Cosby. Zenger was acquitted in 1735 by jurors who rejected the trial judge’s instruction that they confine themselves to the question of whether Zenger himself had published the statements at issue and not consider accuracy of those statements or the legitimacy of the law that made it illegal to publish them. This prototypical example of so-called jury nullification was hailed by Founding-era Americans as a paradigmatic example of how jurors can protect fellow citizens from the abuse of criminal law.

## PLEA BARGAINING, COERCION, AND THE MYTH OF THE PURELY FACT-FINDING JURY

Today, we have largely abandoned the constitutionally prescribed process for resolving criminal charges in favor of the ad hoc, undemocratic, and often extraordinarily coercive process that we refer to euphemistically as “plea bargaining.”<sup>45</sup> Our modern reliance on plea bargaining to resolve criminal charges raises a host of legal, political, and moral concerns, including particularly the use of coercion to induce trial waivers and the specter of false confessions. Over time, the government was able to almost completely dislodge the criminal jury from its assigned role as a key democratic guardrail against government oppression, both by transforming the jury from an essentially

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<sup>40</sup> *Ibid.* 104 (quoting Tocqueville, *Democracy in America*, 313.).

<sup>41</sup> See Chris Kemmitt, “Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body,” *University of Michigan Journal of Law Reform* 40 (2006): 105, 109.

<sup>42</sup> *Ibid.* 103-04.

<sup>43</sup> Andrew Guthrie Ferguson, “The Jury As Constitutional Identity,” *University of California Davis Law Review* 47 (2014):1105, 1108-09, [https://lawreview.law.ucdavis.edu/issues/47/4/Articles/47-4\\_Ferguson.pdf](https://lawreview.law.ucdavis.edu/issues/47/4/Articles/47-4_Ferguson.pdf).

<sup>44</sup> *Ibid.* at 1109 n.13 (quoting Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 *The Papers of Thomas Jefferson*, 282, 283 (J. Boyd ed., 1958)).

<sup>45</sup> For a thorough discussion of the history of plea bargaining in America, see George Fisher, “Plea Bargaining’s Triumph,” *Yale Law Journal* 109 (2000): 857.



political and injustice-preventing body into a largely irrelevant fact-finding body,<sup>46</sup> and also by discouraging defendants from exercising their right to trial by threatening them with severe [trial penalties](#).

But trial penalties are just the tip of the iceberg. American prosecutors possess a [fearsome array of tools](#) with which they can—and [routinely do](#)—exert extraordinary pressure on criminal defendants to plead guilty. This includes pretrial detention, mandatory minimum sentences, creative charge-stacking, and even threatening to indict (or promising not to indict) a defendant’s family members simply to exert plea leverage.<sup>47</sup> These coercive levers are especially potent in the federal system, which helps explain why more than 98 percent of federal convictions are obtained from guilty pleas, and [only two percent of cases end up going to trial](#).

As noted above, the largely unfettered use of coercion in plea bargaining raises serious questions of political and moral legitimacy, including fact that [innocent people](#) are [regularly coerced](#) into pleading guilty to crimes they did not commit while enabling the government to [conceal police misconduct](#) that would otherwise come to light. Plea bargaining undermines the perceived legitimacy of the criminal justice system in various ways, including by creating serious doubts about the validity of convictions obtained through potentially coerced pleas and by enabling perpetrators of despicable crimes like Jeffrey Epstein to receive vastly lower punishments than they deserve.<sup>48</sup>

Notably, plea bargaining also lowers the cost of securing criminal convictions to the point where the government almost certainly pursues vastly more prosecutions than it would if each one had to culminate in a jury trial, including cases of such marginal value that the government would surely drop them if the only alternative were to incur the expense and inconvenience of a jury trial.<sup>49</sup> And of course this raises profound questions about overcriminalization and mass incarceration because if we’re not willing to pay for a trial—including requiring twelve people to take time away from their work and families to sit on a jury for days, weeks, or even months—then that seems like a fair indication that the conduct at issue does not merit the potentially life-destroying sanction of incarceration. Of course, this has clear implications for addressing one of the most widely acknowledged pathologies in our system, namely, the notion that we criminalize too many things and routinely impose sentences that are too severe. “By allowing the jury to involve itself in the functional vetting of legislation,” [Chris Kemmet notes](#), legislators will be better able to account for community sentiment as expressed through verdicts in particular cases, which will, “in turn, lead to [criminal laws] that bear[] the true imprimatur of democratic approval.”

Finally, we should not be blind to the vicious cycle that plea-driven mass adjudication has in a racially disparate criminal justice like ours. As noted, the less costly it is for the government to obtain criminal convictions, the more of them it can pursue. Besides more prisoners, more criminal convictions mean more disenfranchised citizens,

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<sup>46</sup> For more on the transformation of the American jury from an injustice-preventing body into a purely fact-finding body, see Aliza Plener Cover, “Supermajoritarian Criminal Justice,” *George Washington Law Review* 87 (2019): 875; Chris Kemmett, “Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body,” *University of Michigan Journal of Law Reform* 40 (2006): 105; and Clay Conrad, *Jury Nullification: The Evolution of a Doctrine* (1998).

<sup>47</sup> See *United States v. Seng Chen Yong*, 926 F.3d 582, 591-92 (9th Cir. 2019) (collecting cases).

<sup>48</sup> See, e.g., Carissa Byrne Hessick, *Punishment Without Trial: Why Plea Bargaining Is a Bad Deal* (Abrams Press 2021) 156-59 (describing how plea bargaining enables sex offenders like Jeffrey Epstein to avoid responsibility for their crimes by pleading guilty to lesser—and sometimes entirely fictional—offenses).

<sup>49</sup> For a fascinating discussion of how efficiency can be a bug rather than a feature in the administration of criminal justice, see Darryl K. Brown, “The Perverse Effects of Efficiency in Criminal Process,” *University of Virginia Law Review* 100 (2014): 183, [https://www.virginialawreview.org/wp-content/uploads/2020/12/Brown\\_Book.pdf](https://www.virginialawreview.org/wp-content/uploads/2020/12/Brown_Book.pdf).



a disproportionate number of whom are black and brown. But it's not just the right to vote that convicted felons lose; [per Kemmet](#), "About four times as many states ban felon jurors from life as ban felon voters for life." Thus, perversely, those with the greatest personal knowledge of the criminal justice system—including both what it is really like to be incarcerated and the likelihood that the defendant will be facing a substantial trial penalty for exercising his right to trial—are most likely to be excluded from the very democratic institution that could benefit the most from their unique perspective.<sup>50</sup>

## MAKING CRIMINAL JURY TRIALS A MEANINGFUL PART OF THE DEMOCRATIC PROCESS AGAIN

Whether it is possible to rescue the institution of the criminal jury trial from our embrace of plea-driven mass adjudication is unfortunately far from clear. Americans have a strong carceral appetite, as evidenced in part by the fact that we lock people up at about six times the rate of other liberal democracies such as Australia, Canada, and England. We have also embraced the dubious proposition that it is perfectly natural for criminal defendants to plead guilty without undue coercion and that nearly all of them may be induced to do so without raising any significant due process concerns or violating their Sixth Amendment right to a jury trial. And while it is fatuous to suggest, as some have, that the system would "grind to a halt" without plea bargaining, fewer guilty pleas would almost certainly mean more jury trials, with all of the additional effort, expense, and inconvenience they entail compared to plea bargaining.

However, for the reasons set forth above, we believe it would be salutary to restore jury trials to their constitutionally designated role as the default mechanism for resolving criminal charges, both because it would help restore public faith in the legitimacy of the criminal justice system and because it would provide greater opportunities for democratic participation in the civic life of the country. Here are some ways this could be accomplished:

- Judges could stop accepting guilty pleas absent extenuating circumstances (as U.S. District Court [Judge Joseph Goodwin has done](#) in West Virginia).
- Governors and the president could forbid the use of coercive plea tactics and also commute the sentences of prisoners whom they believe have received an excessive trial penalty as a result of their refusal to plead guilty.
- We could create "[trial lotteries](#)" that would send a random sample of cases resolved by plea bargain to trial in order to see whether the government is able to obtain a guilty verdict; this would enable us to better estimate how often plea bargaining produces convictions in cases involving innocent defendants or otherwise lacking a sufficient quantum of proof to produce a valid conviction.
- We could provide jurors with information that is currently withheld from them, including what the [consequences will be for the defendant if they convict](#) and the historical role of juries in protecting defendants against unjust convictions and the imposition of unjust punishments, including trial penalties.

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<sup>50</sup> For further discussion of the relationship between coercive plea bargaining and disenfranchisement, see Somil Trivedi and Julie Ebenstein, "Mass Disenfranchisement," *Inquest* (Feb. 11, 2022), <https://inquest.org/mass-disenfranchisement/>.



- We could create “plea integrity units” that would perform an independent assessment of proposed plea agreements to determine whether there are significant weaknesses in the case, what sort of pressure applied to induce the defendant to plead guilty, and whether the quality of the defendant’s representation appears to have been adequate.

## CONCLUSION

Criminal jury trials have historically served as a key guardrail of democracy and were indisputably intended to do so here in America by our nation’s Founders. But we have rejected that ancient wisdom and sacrificed on the altar of efficiency the many civic virtues that juries promote. Accordingly, reestablishing criminal jury trials as the default mechanism for adjudicating criminal charges, and ensuring that ordinary Americans once again occupy their rightful place at the heart of the administration of criminal justice.

