

NOT BORN A DEMOCRACY: CONSTITUTIONAL PRECONDITIONS

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ABSTRACT

Beneath growing perceptions of constitutional crisis and democratic fragility in the United States lies a fundamental conundrum. Critical preconditions for effective self-government are either weak or missing in action, and our constitutional system, at least for now, stands in the way of actions to strengthen or build those preconditions. This Article focuses on three essential predicates for constitutional democracy that face jeopardy: education, reliable news, and security against lethal violence. As basic as these elements may be, repeated efforts to secure a federal constitutional right to education have failed in the courts. Because of a confluence of legal, technological, and economic problems, once vibrant newspapers and magazines in the United States are rapidly shrinking or closing. Deaths and injuries due to guns mount yearly, and courts block reform efforts to advance human safety. Why are these meaningful preconditions for self-government? Why are even earnest efforts at fortifying them blocked? And what are promising ways forward?

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INTRODUCTION

When he was Secretary-General of the United Nations, Kofi Annan said: “[N]o nation is born a democracy.”¹ Certainly, no nation is born a constitutional democracy. Historically, societies embracing the ideal started far from it. Ancient Athens, ancient Rome, and the early government of the United States confined self-government to an exclusive elite depending on the coerced labor of other human beings. Many so-called constitutional democracies have engaged in empire-building predicated on conquest and social hierarchy, violating their alleged values.² Even the much-celebrated Scandinavian nations in recent years have considered betraying their ideals when it comes to immigrants and other “others.”³

It has become common to note how constitutional democracies around the globe are in real trouble. Seemingly functioning democratic systems have collapsed.⁴ Even nations proud of their constitutions and democratic institutions risk erosion and disintegration.⁵ Current elected leaders in Hungary, Venezuela, the Philippines, and Turkey engage in authoritarian practices “to dominate not only the executive and legislative branches, but also the

1. Press Release, Secretary-General Kofi Annan, ‘A Society That Cuts Itself Off from Its Youth Severs Its Lifeline,’ Secretary-General Tells Ministers for Youth World Conference, U.N. Press Release SG/SM/6670 (Aug. 10, 1998).

2. See generally RECONSIDERING THE *INSULAR CASES*: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (exploring the colonist historical context of the *Insular Cases* and the implications for U.S. territories); BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006) (explaining how the *Insular Cases* politically and constitutionally subordinate U.S. territories and deny equal representation to territorial inhabitants); Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449 (2022) (detailing the rise of various democratic nations through asserting different power dynamics).

3. See Jacob Lind, Anna Lundberg, Hanna Scott & Karin Åberg, *Sweden: Government Considers Obligation to Denounce Undocumented Migrants*, PICUM: BLOG (Oct. 9, 2023), <https://picum.org/blog/sweden-government-considers-obligation-to-denounce-undocumented-migrants/> [<https://perma.cc/3B4L-8AHT>].

4. See BENJAMIN CARTER HETT, *THE DEATH OF DEMOCRACY: HITLER’S RISE TO POWER AND THE DOWNFALL OF THE WEIMAR REPUBLIC* 7-9 (2018); DAVID RUNCIMAN, *HOW DEMOCRACY ENDS* 35-38 (2018) (describing coup against Athenian democracy).

5. See CRAIG CALHOUN, DILIP PARAMESHWAR GAONKAR & CHARLES TAYLOR, *DEGENERATIONS OF DEMOCRACY* 1-6 (2022).

media, the judiciary, civil society,” security forces, and the economy.⁶ Curbing individual rights in the name of national security, manipulating mass media and elections, demonizing critics, spreading corruption—these are the elements identified by Professor Timothy Snyder in his historical lessons on tyranny.⁷ Some writers note eerie parallels between Hitler in Germany and Mussolini in Italy with Orban in Hungary.⁸ Here in the United States, some current public figures seem to read from the same playbook: Blame others, attack immigrants, foment social divisions, and demonize any source of authority other than themselves.⁹ Our recently elected president has authorized assaults on both the administrative state and guardrails on presidential power while attacking immigrants and deploying law enforcement against those believed to have ever challenged him.¹⁰

6. See Arch Puddington, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians*, FREEDOM HOUSE 1, 10-14, 35-40, 52-56 (2017) https://freedomhouse.org/sites/default/files/2020-02/June2017_FH_Report_Breaking_Down_Democracy.pdf [<https://perma.cc/9ZXU-X8SN>] [hereinafter BREAKING DOWN DEMOCRACY].

7. See TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA* (2018); see also BREAKING DOWN DEMOCRACY, *supra* note 6, at 10-14, 35-40, 52-56 (describing the modern authoritarian strategy).

8. See Olivia B. Waxman, *Historian: Today's Authoritarian Leaders Aren't Facists—But They Are Part of the Same Story*, TIME (Nov. 10, 2020, at 09:00 ET), <https://time.com/5908244/strongman-fascism-history/> [<https://perma.cc/T22T-52GY>] (describing RUTH BENGHIAT, *STRONGMEN: MUSSOLINI TO THE PRESENT* (2020)); Keno Verseck, *Orban's 'Pure Nazi' Speech Shakes Up Politics*, DEUTSCHE WELLE (July 27, 2022), <https://www.dw.com/en/orbans-pure-nazi-speech-triggers-political-earthquake/a-62619164> [<https://perma.cc/FK5P-MAW4>]; see also Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 125, 129-33 (2018); Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1717-18, 1721, 1728-29 (2015); Kevin Casas-Zamora, *Look at Latin America. This Is How Democracies Fail.*, N.Y. TIMES (Apr. 13, 2023), <https://www.nytimes.com/2023/04/13/opinion/international-world/democracy-latin-america.html> [<https://perma.cc/79FX-L22P>].

9. Steven Rosenfeld, *Leading Civil Rights Lawyer Shows 20 Ways Trump Is Copying Hitler's Early Rhetoric and Policies*, COMMON DREAMS (Aug. 9, 2019), <https://www.commondreams.org/views/2019/08/09/leading-civil-rights-lawyer-shows-20-ways-trump-copying-hitlers-early-rhetoric-and> [<https://perma.cc/ZZD2-52GE>] (describing BURT NEUBORNE, *WHEN AT TIMES THE MOB IS SWAYED: A CITIZEN'S GUIDE TO DEFENDING OUR REPUBLIC* (2019)).

10. Eric Tucker, Michelle L. Price & Zeke Miller, *With Firings and Lax Enforcement, Trump Moving to Dismantle Government's Public Integrity Guardrails*, WHYY (Feb. 11, 2025), <https://whyy.org/articles/trump-firings-federal-government-public-integrity/> [<https://perma.cc/SMH7-97BG>]; *When a President Takes On the Administrative State*, HARV. L. TODAY (Mar. 12, 2025), <https://hls.harvard.edu/today/when-a-president-takes-on-the-administrative-state/> [<https://perma.cc/4ZBB-QZ4C>]; Jonathan Rauch, *One Word Describes Trump*, ATLANTIC (Feb. 24, 2025), <https://www.theatlantic.com/ideas/archive/2025/02/corruption-trump-administration/681794/> [<https://perma.cc/95W7-8NRN>].

The problem for constitutional democracies is not the occasional emergence of demagogues.¹¹ Every age produces them. The deeper challenge is the erosion of belief and commitment to the practices and institutions that provide accountability and that grow a sense of shared fates for societies embarked on self-governance.¹² As individual leaders and their supporters accumulate personal power and wealth, they deliberately, or in effect, hollow out democratic institutions and constitutional values. Modern authoritarians in erstwhile democracies cast doubt on or even hijack elections and sources of reliable information, appealing to the psychological and economic discontent of the people without in fact doing much for them.¹³

“Democratic deterioration” is detected now in parts of Europe, South America, India, and the United States.¹⁴ More than sixty nations—involving 49 percent of the world’s population—went to electoral polls in 2024 amid potential floods of misinformation and disinformation.¹⁵ Incumbents and traditional parties faced deep challenges as right-wing groups gained support, reflecting widespread dissatisfaction with economic and social trends.¹⁶ The United States took the extraordinary step of punishing allies of Venezuela’s

11. See Martha Minow *Urges Us to “Resist Tyranny and Revenge,”* LEO BAECK INST. (Nov. 26, 2019), <https://www.lbi.org/news/leo-baeck-medal-martha-minow/> [https://perma.cc/W5GQ-ETXL].

12. See *id.*

13. See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 72-94 (2018); ANNE APPLEBAUM, *TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM* 23-44 (2020); R. Evan Ellis, *The Struggle for the Soul of the Latin American Left*, TRANSREGIONAL THREATS J., Apr. 2022, at 1, 8-11, <https://www.securefreesociety.org/wp-content/uploads/2022/04/TTJ-ISSUE-8-The-Struggle-for-the-Soul-of-the-Latin-American-Left.pdf> [https://perma.cc/4WLR-JVTQ].

14. See RICHARD HAASS, *THE BILL OF OBLIGATIONS: THE TEN HABITS OF GOOD CITIZENS* 17-35 (2023); Sumathi Bala, *Modi’s Strongman Rule Raises Questions About India’s ‘Democratic Decline’ as He Seeks a Third Term*, CNBC (May 17, 2024, at 06:05 ET), <https://www.cnbc.com/2024/05/17/modi-strongman-rule-raises-questions-on-indias-democratic-decline.html> [https://perma.cc/GN4C-GDD3].

15. See Koh Ewe, *The Ultimate Election Year: All the Elections Around the World in 2024*, TIME (Dec. 28, 2023, at 00:00 ET), <https://time.com/6550920/world-elections-2024/> [https://perma.cc/G594-YYBQ].

16. See Richard Wike, Moira Fagan & Laura Clancy, *Global Elections in 2024: What We Learned in a Year of Political Disruption*, PEW RSCH. CTR. (Dec. 11, 2024), <https://www.pewresearch.org/global/2024/12/11/global-elections-in-2024-what-we-learned-in-a-year-of-political-disruption/> [https://perma.cc/MM7H-C559].

Nicolás Maduro for human rights violations and obstructing voting in the disputed presidential election there.¹⁷

Even as the forms of democratic elections and courts continue to exist, they elicit declining amounts of confidence. Perhaps the deepest challenge for constitutional democracies comes with the rising number of people around the world who believe this form of government is not working.¹⁸ Understanding these trends and the reasons for them is critical. A prominent poll reported that among eighteen- to twenty-nine-year-olds in the United States, only 57 percent said that keeping the nation a democracy is very important.¹⁹ Those coming of age in recent years may have seen democratic societies fumbling or paralyzed during the COVID-19 pandemic, periods of economic instability and inequality, refugee and immigration crises, environmental catastrophes inefficacy, global wars, and elections flooded with dark money and allegations of corruption.²⁰ No wonder disillusionment and skepticism about

17. See Regina Garcia Cano, *U.S. Sanctions 16 Allies of Venezuela's President over Accusations of Obstructing Election*, L.A. TIMES (Sep. 12, 2024, at 11:04 PT), <https://www.latimes.com/world-nation/story/2024-09-12/us-sanctions-16-allies-of-venezuelas-president-over-accusations-of-obstructing-the-election> [https://perma.cc/734U-ES3C]; Mauricio Maldonado, *Trump Warns Maduro Not to Harm Venezuelan Opposition Leaders After Machado's Detention*, CBS NEWS (Jan. 9, 2025, at 22:57 ET), <https://www.cbsnews.com/miami/news/trump-warns-maduro-not-to-harm-venezuelan-opposition-leaders-after-machados-detention/> [https://perma.cc/PAC5-SJQ7].

18. See Diane Brady, *Global Study Shows Majority of 18-34 Year Olds Support Using Violence and Disinformation to Drive Change*, FORTUNE (Jan. 19, 2025, at 12:00 ET), <https://fortune.com/2025/01/19/edelman-trust-barometer-violence-disinformation-social-trends/> [https://perma.cc/FR87-8FEE]; Richard Wike, Janell Fetterolf, Maria Smerkovich, Sarah Austin, Sneha Gubbala & Jordan Lippert, *Representative Democracy Remains a Popular Ideal, but People Around the World Are Critical of How It's Working*, PEW RSCH. CTR. (Feb. 28, 2024), <https://www.pewresearch.org/global/2024/02/28/representative-democracy-remains-a-popular-ideal-but-people-around-the-world-are-critical-of-how-its-working/> [https://perma.cc/Y85J-KQJH]; Nicholas Riccardi & Linley Sanders, *Americans Are Widely Pessimistic About Democracy in the United States, an AP-NORC Poll Finds*, AP NEWS (July 14, 2023, at 00:12 ET), <https://apnews.com/article/poll-democracy-partisanship-trump-biden-trust-221f2b4f6cf9805f766c9a8395b9539d> [https://perma.cc/U5GE-L8B8].

19. See *Harvard Youth Poll*, HARV. KENNEDY SCH. INST. POL. (Fall 2021), <https://iop.harvard.edu/youth-poll/42nd-edition-fall-2021> [https://perma.cc/Z542-G2ML]; see also Gary Fields & Linley Sanders, *Americans Agree that the 2024 Election Will Be Pivotal for Democracy, but for Different Reasons*, AP NEWS (Dec. 15, 2023, at 14:09 ET), <https://apnews.com/article/democracy-2024-election-trump-biden-poll-39309519c8473175c25ab5a305e629ba> [https://perma.cc/2XZY-YK43] (explaining predictions before the elections).

20. The United States is divided politically with widespread distrust and demonization. See Jeffrey M. Jones, *Record Low in U.S. Satisfied with Way Democracy Is Working*, GALLUP

democracy is abound. Yet amid polarization over many issues, even the meaning of “democracy-facing threats” signaled contrasting concerns.²¹ Some prominent leaders, notably in technology and finance companies, expressly criticize democracy as inefficient and passé.²²

Hence, lying behind disagreements over any particular environmental, economic, social, or foreign policies are sharp disputes over the actual value of democratic governance and constitutional principles. Those divisions animate willingness to support violent actions against opponents, including election officials, election workers, and judges.²³ The United States is only one of many ostensible constitutional democracies across the globe manifesting such

(Jan. 5, 2024), <https://news.gallup.com/poll/548120/record-low-satisfied-democracy-working.aspx> [https://perma.cc/6PWG-JRVX].

21. President Biden and Vice President Harris warned that former President Trump would bring authoritarianism and abuse his powers if returned to office. Gabe Gutierrez & Peter Nicholas, *In Forceful Condemnation of Trump, Biden Warns that ‘MAGA’ Backers Pose Grave Threat to Democracy*, NBC NEWS (Sep. 28, 2023, at 19:56 ET), <https://www.nbcnews.com/politics/2024-election/biden-trump-describe-maga-extremist-rcna117796> [https://perma.cc/FM5G-46LL]. Former President and then-candidate Trump asserted that Biden and Harris had been destroying democracy and weaponizing the justice system with lawsuits against him for election subversion, mishandling classified documents, abusing government powers, offering hush money, and engaging in business misconduct. Nicholas Riccardi & Michelle L. Price, *Trump Calls Biden the ‘Destroyer’ of Democracy Despite His Own Efforts to Overturn 2020 Election*, AP NEWS (Dec. 2, 2023, at 19:45 ET), <https://apnews.com/article/trump-biden-democracy-election-2024-f2f824f056ae9f81f4e688fe590f41b4> [https://perma.cc/4MP8-MUXP].

22. See Mike Brock, *The Plot Against America*, NOTES FROM THE CIRCUS (Feb. 8, 2025), <https://www.notesfromthecircus.com/p/the-plot-against-america> [https://perma.cc/6MAG-84S3].

23. See Peter Eisler, Mike Spector, Ned Parker & Nate Raymond, *Exclusive: Judges Face Rise in Threats as Musk Blasts Them over Rulings*, REUTERS (Mar. 5, 2025, at 21:08 ET), <https://www.reuters.com/world/us/judges-face-rise-threats-musk-blasts-them-over-rulings-2025-03-05/> [https://perma.cc/Q4FG-B52A]; John Gramlich, *A Look Back at Americans’ Reactions to the Jan. 6 Riot at the U.S. Capitol*, PEW RSCH. CTR. (Jan. 4, 2022), <https://www.pewresearch.org/short-reads/2022/01/04/a-look-back-at-americans-reactions-to-the-jan-6-riot-at-the-u-s-capitol/> [https://perma.cc/MJV9-LK55]; Rachel Kleinfeld, *The Rising Tide of Political Violence*, FOREIGN AFFS. (July 19, 2024), <https://www.foreignaffairs.com/united-states/rising-tide-political-violence> [https://perma.cc/3MT2-RW25]; Sam Levine, *US Election Officials ‘Look over Shoulders More’ as Political Violence Surges*, GUARDIAN (Sep. 17, 2024, at 07:00 ET), <https://www.theguardian.com/us-news/2024/sep/17/election-officials-concerns-political-violence> [https://perma.cc/2V6D-482H]; Chris Walker, *Millions of Americans Would Approve of Using Violence to Put Trump Back in WH*, TRUTHOUT (Sep. 29, 2022), <https://truthout.org/articles/millions-of-americans-would-approve-of-using-violence-to-put-trump-back-in-wh/> [https://perma.cc/97U8-WD5Z].

sharp divisions.²⁴ I worry that the actual ingredients of effective self-government are either weak or missing in action in the United States. And in palpable ways—including binding Supreme Court decisions—the American constitutional system stands in the way of actions to strengthen or build those preconditions.

Even ardent supporters of constitutional democracy emphasize the daunting obstacles to make it work at any time and in any place. Evidence of needed preconditions can be found in scholarly and popular writings about ideals and practices of constitutional democracy.²⁵ Defenders agree that the basic predicates of constitutional democracy include: (1) acceptance of election results to ensure peaceful transitions after the voting is done—and the reciprocity such acceptance requires;²⁶ (2) peaceful co-existence even amid social, political, and religious differences sufficient to support inclusive political debate among people with different affiliations and views;²⁷ (3) adequate capacity and stability for families or other

24. See Pippa Norris, “*Things Fall Apart, the Center Cannot Hold*”: Fractionalized and Polarized Party Systems in Western Democracies, 23 EUR. POL. SCI. 546 (2024) (observing ideological polarization around democratic commitments in Western Europe and the United States, not due to fractionalized parties); Jonah Shepp, *2024 Could Be a Very Rough Year for Democracy*, N.Y. MAG. (Jan. 1, 2024), <https://nymag.com/intelligencer/2024/01/2024-could-be-a-very-rough-year-for-democracy.html> [<https://perma.cc/BYC9-MDQP>] (discussing challenges given right-wing advances in countries including the United States, India, Netherlands, Portugal, and Austria).

25. A broader investigation would research historical and cross-cultural elements of social order, societal transitions from autocracy to democracy, and democratic collapse. See JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 8-10, 110-22 (2022); DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY* 25-27 (2009); RITCHIE ROBERTSON, *THE ENLIGHTENMENT: THE PURSUIT OF HAPPINESS 1680-1790*, at 683-91 (2021); Joseph V. Femia, *Barrington Moore and the Preconditions for Democracy*, 2 BRIT. J. POL. SCI. 21 (1972); COMM’N ON BEHAV. & SOC. SCIS. & EDUC., NAT’L RSCH. COUNCIL, *THE TRANSITION TO DEMOCRACY: PROCEEDINGS OF A WORKSHOP* (1991); Wolfgang G. Weber & Christine Unterrainer, *The Analysis of Preconditions for the Fostering of Democratic Behavioural Orientations in Business Organizations—The ODEM Questionnaire (POPD)*, in *DEMOCRATIC COMPETENCES AND SOCIAL PRACTICES IN ORGANIZATIONS* 118, 118-20 (Wolfgang G. Weber et al. eds., 2012); Jeremy K. Kessler, *The Political Economy of “Constitutional Political Economy,”* 94 TEX. L. REV. 1527, 1527-35, 1539-40, 1553-54 (2016).

26. See, e.g., Dieter Stiers, *Electoral Input and Political Legitimacy*, W. EUR. POL. 21-23 (July 1, 2025), <https://www.tandfonline.com/doi/full/10.1080/01402382.2025.2521591?src=#abstract> [<https://perma.cc/G7KQ-QLJK>].

27. See generally NORTH ET AL., *supra* note 25 (discussing the importance of groups and organizations to modern liberal democracies and their effects on violence).

social groups providing care for children and the elderly as both ingredients and goals of self-governance and social continuity;²⁸ (4) freedom for individuals to form and maintain private associations, organizations, and religions as training grounds for self-governance as well as bulwarks of freedom against the power of the state;²⁹ (5) genuine promise to eliminate permanent social castes, including persistent inequalities along economic, racial, ethnic, or religious lines;³⁰ and (6) effective vigilance against entrenchment of power and corruption that blocks criticism and change, preventing reliable means for self-governance and rights for all.³¹ Each of these predicates deserves more than the brief mention I offer in this Article.

I focus here on three constituent ingredients—three predicates—that seem both fundamental to not only the creation but also to the durability of constitutional democracy, and yet in the United States mid-2025 seem caught in intractable difficulties: (1) education as preparation for citizenship, (2) robust and sustainable sources of news, and (3) human security against lethal violence, including gun violence. The work of self-governance over time depends on participants informed, committed, and secure enough to participate. Yet ensuring education, maintaining a robust and substantial press, and assuring safety from violence face barriers across the United States. The roadblocks, in no small part, come from judicial

28. See, e.g., JOAN C. TRONTO, *CARING DEMOCRACY: MARKETS, EQUALITY, AND JUSTICE* (2013).

29. See, e.g., PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* (Michael Novak ed., 2d ed. 1996).

30. See Nolen Deibert, *Protecting the Rights of Religious Minorities Is Crucial to Protecting Democracy Itself*, FREEDOMHOUSE (Dec. 7, 2023), <https://freedomhouse.org/article/protecting-rights-religious-minorities-crucial-protecting-democracy-itself> [<https://perma.cc/YK8Q-ZWP9>]; Tyrone Grandison, *Racism Is the Greatest Threat to Democracy Today*, FULCRUM (June 15, 2020), <https://thefulcrum.us/big-picture/racism-in-america> [<https://perma.cc/3X2L-4H5S>]; Oren M. Levin-Waldman, *How Inequality Undermines Democracy*, E-INT'L RELS. (Dec. 10, 2016), <https://www.e-ir.info/2016/12/10/how-inequality-undermines-democracy/> [<https://perma.cc/EZD9-HHUR>]; Andrew Yeo, Teresa S. Encarnacion Tadem, Meredith L. Weiss, Kok-Hoe Ng & Byunghwan Son, *Democracy and Inequality*, BROOKINGS INST. (Dec. 2022), <https://www.brookings.edu/articles/democracy-and-inequality/> [<https://perma.cc/Z8WY-ZFTM>]; see also APSA Task Force, *American Democracy in an Age of Rising Inequality*, 2 PERSPS. ON POL. 651, 657-58 (2004) (providing empirical data on inequality and describing how inequality has stalled democratic progress).

31. See, e.g., FISHKIN & FORBATH, *supra* note 25, at 8-9, 110-22 (discussing anti-oligarchy measures to protect democracy).

interpretations of the Constitution. Courts have repeatedly rebuffed efforts to secure a federal constitutional right to education even as individual schools fail to provide even minimally effective instruction and nationwide scores on tests of knowledge reveal stark failures.³² Constitutional understandings seem to chill responses to the confluence of legal, technological, and financial difficulties rapidly shrinking or shutting down vibrant newspapers, magazines, and other media in the United States.

On security, violence and the risk of violence jeopardize any kind of society. Death threats against judges and actual violence against leaders reflect high levels of distrust and polarization as well as desensitization to violence and its effects.³³ The levels of lethal gun violence make the United States exceptional. The gap between public opinion and what the courts allow could send confidence in the system of government itself into a death spiral. Since 2020, gun violence has been a leading cause of death for the nation's youth as well as a major source of injuries.³⁴ The U.S. Surgeon General under President Biden identified firearm violence as a critical public

32. As all-time lows since the collection of such data, the May 2023 results of National Assessment of Education Progress tests show that "13 percent of eighth-graders met proficiency standards for U.S. history" and only "about 20 percent of students scored at or above the proficient level in civics." Larry Sand, *Our Failing Schools Are a National Crisis*, CITY J. (July 14, 2023), <https://www.city-journal.org/article/our-failing-schools-are-a-national-crisis> [<https://perma.cc/4FNP-4442>] (reporting National Assessment of Educational Progress (NAEP) scores and apparent effects of COVID-19 and inadequate teachers on student learning). The scores in reading competency set all-time lows in these areas, and the mathematics scores are among the lowest recorded. *Id.*

33. On desensitization around violence due to media and first-hand exposure, see Sylvie Mrug, Anjana Madan & Michael Windle, *Emotional Desensitization to Violence Contributes to Adolescents' Violent Behavior*, 44 J. ABNORMAL CHILD PSYCH. 75, 76-77 (2016); Michael Pittaro, *Exposure to Media Violence and Emotional Desensitization*, PSYCH. TODAY (May 6, 2019), <https://www.psychologytoday.com/us/blog/the-crime-and-justice-doctor/201905/exposure-media-violence-and-emotional-desensitization> [<https://perma.cc/CJG3-VUPT>].

34. See Jason E. Goldstick, Rebecca M. Cunningham & Patrick M. Carter, *Current Causes of Death in Children and Adolescents in the United States*, 386 N. ENGL. J. MED. 1955 (2022) (commenting on Center for Disease Control and Prevention data). During 2020 and 2021, guns contributed to more deaths of children and youth aged one to seventeen years old than any other cause. *Preventing Firearm Violence and Injuries Impacting Children and Teens*, CDC (Dec. 16, 2024), <https://www.cdc.gov/firearm-violence/php/research-summaries/children-and-teen-impacts.html> [<https://perma.cc/L3FS-8Y59>]; see Matt McGough, Krutika Amin, Nirmita Panchal & Cynthia Cox, *Child and Teen Firearm Mortality in the U.S. and Peer Countries*, KAISER FAMILY FOUND. (July 18, 2023), <https://www.kff.org/mental-health/issue-brief/child-and-teen-firearm-mortality-in-the-u-s-and-peer-countries/> [<https://perma.cc/7C23-7PTT>].

health crisis.³⁵ Ultimately, in jeopardy here is faith in the system of government as majorities favor restrictions on firearms, but the courts, relying on the U.S. Constitution, block many restrictions on sales and uses of guns.³⁶ Judicial interpretations of the Second Amendment “right to bear arms” create confusion and drain confidence in the government and in public safety.³⁷

Constitutional democracy aims to produce what it also presumes: equal respect for self-governing members of society.³⁸ Our Constitution announces rights against the government. It enables judicial enforcement, authorizes elections, and divides governmental power to check tyranny. It imagines a virtuous circle, checking power while enabling self-government and individual rights. These rights and structures in the eyes of many are not working to guard against entrenched power and do not enable effective self-government. If preconditions for these structures and rights are frail or absent, what can be done? The crises in education, news, and guns illuminate the obstacles but also, I hope, prompt ideas about potential ways forward to strengthen constitutional democracy.

I. EDUCATION

Let us start with education. A constitutional democracy requires a critical mass of people who participate in politics and believe in (1) advancing self-governance; (2) individual rights; and (3) restraining oppressive power. Each new generation needs opportunities to

35. See *Off. of the Surgeon Gen., U.S. DEP'T OF HEALTH & HUM. SERVS., THE U.S. SURGEON GENERAL'S ADVISORY ON FIREARM VIOLENCE: A PUBLIC HEALTH CRISIS IN AMERICA* 3-5 (2024), <https://web.archive.org/web/20250116011709/https://www.hhs.gov/sites/default/files/firearm-violence-advisory.pdf> [<https://perma.cc/6VFG-ABU7>].

36. See Michael Waldman, *How the NRA Rewrote the Second Amendment*, BRENNAN CTR. FOR JUST. (May 20, 2014), <https://www.brennancenter.org/our-work/research-reports/how-nra-rewrote-second-amendment> [<https://perma.cc/2B2L-6SYV>]; Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (July 24, 2024), <https://www.pewresearch.org/short-reads/2024/07/24/key-facts-about-americans-and-guns/> [<https://perma.cc/WHW8-9YH9>] (finding that 58% of U.S. adults favor stricter gun laws).

37. See Alanna Durkin Richer & Lindsay Whitehurst, *Supreme Court Ruling Creates Turmoil over Guns in Lower Courts*, PBS NEWS HOUR (Feb. 18, 2023, at 14:05 ET), <https://www.pbs.org/newshour/nation/supreme-court-ruling-creates-turmoil-over-gun-laws-in-lower-courts> [<https://perma.cc/B8B9-SG8L>].

38. I developed this idea previously in *Education: Constitutional Democracy's Predicate and Product*, 73 S.C. L. REV. 537, 538-39 (2022).

learn and chances to identify leaders who will advance general welfare and adhere to the Constitution. Education should cultivate literacy, critical thinking, and both knowledge of and appreciation for civic infrastructure.³⁹ For a constitutional democracy to remain viable, successive generations need to develop skills and attitudes critical to self-governance. Those skills and dispositions include knowing how to access and assess information and, as two experts put it, having “appreciation of the responsibilities of citizenship, interest in the welfare of others, a sense of personal and collective agency, and capacity to engage in civil disagreement while maintaining civic friendship.”⁴⁰ Education does and must take place in homes, neighborhoods, associations, religious settings, mass media, cultural events, service through military branches, juries, and communities.⁴¹ But collective investment in education around the world has turned to and will continue to focus on schooling supported by the government.⁴²

39. See JULIA H. KAUFMAN, MELISSA KAY DILIBERTI, DOUGLAS YEUNG & JENNIFER KAVANAGH, *DEFINING AND MEASURING CIVIC INFRASTRUCTURE* 9-15, 57-58 (RAND CORP. 2022), https://www.rand.org/content/dam/rand/pubs/research_reports/RRA100/RRA112-24/RAND_RRA112-24.pdf [<https://perma.cc/W3TY-2QJL>]; Jennifer L. Hochschild & Nathan Scovronick, *Democratic Education and the American Dream*, in *REDISCOVERING THE DEMOCRATIC PURPOSES OF EDUCATION* 209, 210 (Lorraine M. McDonnell, P. Michael Timpone & Roger Benjamin eds., 2000) (“[T]he practice of democracy presumes a degree of civility, shared knowledge, the ability to communicate beyond face-to-face encounters, a willingness to play in accord with the rules of the voting game, tolerance or even respect for disparate views, equal opportunity to attain full citizenship, a common culture, and commitment to the polity even if one’s electoral choice loses.”).

40. See LAURA S. HAMILTON & ACE PARSI, EDUC. TESTING SERV., *MONITORING CIVIC LEARNING OPPORTUNITIES AND OUTCOMES* 3 (2022), https://www.ets.org/Media/Research/pdf/Research_Notes_Hamilton_Parsi.pdf [<https://perma.cc/6WBB-9CSJ>].

41. See BROOK MANVILLE & JOSIAH OBER, *THE CIVIC BARGAIN: HOW DEMOCRACY SURVIVES* 38 (2023). For a rich historical examination of education in a variety of American settings, see generally LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607-1783* (1970) [hereinafter *COLONIAL EXPERIENCE*]; LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE METROPOLITAN EXPERIENCE 1876-1980* (1988).

42. See MICHAEL J. FEUER, *CAN SCHOOLS SAVE DEMOCRACY? CIVIC EDUCATION AND THE COMMON GOOD* 30-31, 63, 73 (2023). “The original rationale for public schooling in the United States was the preparation of democratic citizens who could preserve individual freedom and engage in responsible self-government.” *Id.* at 64-65 (quoting Lorraine McDonnell, *Defining Democratic Purposes*, in *REDISCOVERING THE DEMOCRATIC PURPOSES OF EDUCATION* (Lorraine M. McDonnell, P. Michael Timpone & Roger Benjamin eds., 2000)). As political scientist Sidney Verba observed,

Education is probably still the single most important thing that underlies and ensures democracy. Most of the literature shows that in any place, at any time,

In the United States currently, the aspiration of promoting civic engagement—including disagreements—is jeopardized by “culture wars” with state and now federal policies banning certain topics and viewpoints in schooling.⁴³ These fights obscure significant issues of unequal, and in many places inadequate, schooling. Unlike many

educated people are more likely to be politically active, more likely to be committed to democracy.... Education does not necessarily lead to a more satisfied citizenry, but it does lead to a more democratic citizenry. It leads to a citizenry that is more active in politics and that is less likely to accept violations of democracy.

Sidney Verba, *Threats to Democracy: Plenary Session IV*, in *THE TRANSITION TO DEMOCRACY, PROCEEDINGS OF A WORKSHOP* 74, 74, 79 (1991). Government support for schooling in the United States increasingly includes vouchers for private schools and other stipends for private options, altering prospects for educational opportunities and experiences across members of different backgrounds. See JOSH COWEN, *THE PRIVATEERS: HOW BILLIONAIRES CREATED A CULTURE WAR AND SOLD SCHOOL VOUCHERS* (2024); *Education Savings Accounts: States with Homeschool Grants for Families*, KIDVESTORS (Apr. 4, 2025), <https://www.kidvestors.co/post/education-savings-accounts> [<https://perma.cc/E2XJ-3HBU>]; Exec. Order No. 14191, 90 Fed. Reg. 8859 (Jan. 29, 2025).

43. An executive order enacted soon after President Donald Trump’s second inauguration bans direct or indirect federal support of instruction that “treats individuals as members of preferred or disfavored groups, rather than as individuals, and minimizes agency, merit, and capability in favor of immoral generalizations” or conveys that “[a]n individual, by virtue of the individual’s race, color, sex, or national origin, bears responsibility for, should feel guilt, anguish, or other forms of psychological distress because of, should be discriminated against, blamed, or stereotyped for, or should receive adverse treatment because of actions committed in the past by other members of the same race, color, sex, or national origin, in which the individual played no part” or that reflects how “young men and women are made to question whether they were born in the wrong body and whether to view their parents and their reality as enemies to be blamed.” Exec. Order No. 14190, 90 Fed. Reg. 8853 (Jan. 29, 2025); see also *Department of Defense Censors Curriculum, Removes Books at Schools for Military Families*, SCH. LIBR. J. (Feb. 11, 2025), <https://www.slj.com/story/Department-Defense-Censors-Curriculum-removes-books-Schools-Military-Families-Censorship-News> [<https://perma.cc/MQW2-HJVV>]. For further discussion of current curricular and book ban efforts, see Caroline Mala Corbin, *The Government Speech Doctrine Ate My Class: First Amendment Capture and Curricular Bans*, 76 STAN. L. REV. 1473, 1479-83 (2024); Dustin Hornbeck & Joel R. Malin, *Demobilizing Knowledge in American Schools: Censoring Critical Perspectives*, HUMANS. & SOC. SCIS. COMM’NS, Oct. 5, 2023, at 5-11, <https://www.nature.com/articles/s41599-023-02161-4.pdf> [<https://perma.cc/E93Z-TEK5>] (describing laws in sixteen states restricting school instruction and materials that involve “critical race theory”; that discuss systemic racism or use language that can cause guilt/shame based on race; that ban stereotyping based on gender or sex or that aim to reduce guilt/shame based on sex or gender; and that ban controversial topics specifically or that require teachers to “teach both sides” of a particular issue); AM. OVERSIGHT, *THE FAR-RIGHT ATTACK ON EDUCATION: HOW CURRICULUM AND CLASSROOM CENSORSHIP STIFLES EDUCATORS, HARMS STUDENTS, AND THREATENS OUR DEMOCRACY* 5, 7-8 (2025), <https://americanoversight.org/wp-content/uploads/The-Far-Right-Attack-on-Public-Education.pdf> [<https://perma.cc/8WAF-66Z6>] (identifying twenty-three states that ban content addressing race, sex, gender).

other democratic constitutions, the U.S. Constitution has no textual reference to education or schooling.⁴⁴ Chronic underfunding characterizes American schools as a whole, with inequities between and within districts effectively mirroring and exacerbating economic and racially marked disparities.⁴⁵ Despite excellence in individual schools and districts generally, the United States ranked nineteenth in science and thirtieth in math among the thirty-five members of the Organization for Economic Cooperation and Development.⁴⁶

Inequities in educational resources follow zip code and students' family income. Unequal resources also correlate with race.⁴⁷ With only two exceptions, public schooling across the United States is largely funded by local property taxes, a policy that bakes in inequalities.⁴⁸ Disparities in per-pupil expenditures also mean stark

44. See GLOB. LEGAL RSCH. DIRECTORATE, L. LIBR. OF CONG., CONSTITUTIONAL RIGHT TO AN EDUCATION IN SELECTED COUNTRIES (2016), <https://tile.loc.gov/storage-services/service/l1/lglrd/2016479002/2016479002.pdf> [<https://perma.cc/HTJ9-6TFC>].

45. Jill Barshay, *A Decade of Research on the Rich-Poor Divide in Education*, HECHINGER REP. (June 29, 2020), <https://hechingerreport.org/a-decade-of-research-on-the-rich-poor-divide-in-education/> [<https://perma.cc/B8V9-G2PG>]; Off. Econ. Pol'y, *Post 5: Racial Differences in Educational Experiences and Attainment*, U.S. DEP'T TREASURY: FEATURED STORIES (June 9, 2023), <https://home.treasury.gov/news/featured-stories/post-5-racial-differences-in-educational-experiences-and-attainment> [<https://perma.cc/XP9R-3QMH>].

46. Drew DeSilver, *U.S. Students' Academic Achievement Still Lags That of Their Peers in Many Other Countries*, PEW RSCH. CTR. (Feb. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/> [<https://perma.cc/7TA5-X58G>]. Test results measuring achievement of thirteen-year-olds hit the lowest U.S. scores recorded in decades. David Steiner, *America's Education System Is a Mess, and It's Students Who Are Paying the Price*, THE 74 (July 20, 2023), <https://www.the74million.org/article/americas-education-system-is-a-mess-and-its-students-who-are-paying-the-price/> [<https://perma.cc/AD78-GQD2>]. The pandemic contributed to concerning evidence of low academic achievement in the United States and elsewhere. Matt Barnun, *Learning Loss Hit the U.S. Hard. It's as Bad or Worse Across the World.*, WALL ST. J. (Dec. 5, 2023, at 09:21 ET), <https://www.wsj.com/us-news/education/us-students-global-education-dd7424b2> [<https://perma.cc/A67M-EKTS>].

47. CARMEL MARTIN, ULRICH BOSER, MEG BENNER & PERPETUAL BAFFOUR, CTR. FOR AM. PROGRESS, *A QUALITY APPROACH TO SCHOOL FUNDING: LESSONS LEARNED FROM SCHOOL FINANCE LITIGATION 3* (Nov. 2018), https://www.americanprogress.org/wp-content/uploads/sites/2/2018/11/LessonsLearned_SchoolFunding-report-4.pdf [<https://perma.cc/22Y2-RG4W>].

48. Cory Turner, Reema Khrais, Tim Lloyd, Alexandra Olgin, Laura Isensee, Becky Vevea & Dan Carsen, *Why America's Schools Have a Money Problem*, NPR (Apr. 18, 2016, at 05:00 ET), <https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem> [<https://perma.cc/Q5V9-HFX8>]. Michigan shifted in 1994 to greater reliance on state rather than local funding. Ryan Bergan, *The Basics of School Funding*, MICH. SENATE (Dec. 2023), https://sfa.senate.michigan.gov/departments/datacharts/dck12_schoolfundingbasics.pdf [<https://perma.cc/SEP7-H2LC>]. The Department of Education for the state of Hawaii finances the state's schools. *State of Hawaii Department of Education Budget*, HAW. DEP'T BUDGET &

differences in the availability of rigorous courses, quality instruction, and stable teaching staff.⁴⁹ Contributing to the increasing inequality in educational opportunities within the United States is the large gulf between the ultra-wealthy—who often choose private schools—and everyone else.⁵⁰

Education specifically keyed to preparing individuals to engage in voting and public governance is also available to some students but not for many others. Effective teaching about history and civics helps students gain knowledge and confidence to engage in political activities, but many American schools do not offer such opportunities.⁵¹ Only one in three Americans could pass the nation's citizenship test for naturalizing immigrants.⁵² Without basic understanding of the system, how can individuals know how to participate in the self-governing process? Educational shortfalls curb people's abilities to assess policies and to weigh personal and

FIN. (Dec. 16, 2021), https://budget.hawaii.gov/wp-content/uploads/2021/12/16.-Department-of-Education-FY-23-SUPP.Mn5_.pdf [<https://perma.cc/HH6E-ND8A>].

49. MARTIN ET AL., *supra* note 47, at 7-9. On variations in state methods for funding education, see Adrienne Fischer, Chris Duncombe & Eric Syverson, *50-State Comparison: K-12 and Special Education Funding (2021)*, EDUC. COMM'N OF THE STATES (Oct. 13, 2021), <https://www.ecs.org/50-state-comparison-k-12-and-special-education-funding-2021-archive/> [<https://perma.cc/3BZJ-A73J>]. Tracking within schools also deprives students in lower tracks exposure to educational content and often to excellent teachers. For a global study of within-school inequality, see generally William H. Schmidt, Nathan A. Burroughs, Pablo Zoido & Richard T. Houang, *The Role of Schooling in Perpetuating Educational Inequality: An International Perspective*, 44 EDUC. RESEARCHER 371, 371 (2015).

50. See Barshay, *supra* note 45 (citing studies); Heewon Jang & Sean F. Reardon, *States as Sites of Educational (In)Equality: State Contexts and the Socioeconomic Achievement Gradient*, 5 AERA OPEN 1, 1-2 (2019), <https://journals.sagepub.com/doi/epdf/10.1177/2332858419872459> [<https://perma.cc/FF8Q-9H7Y>] (discussing research on the links between civic education, political participation, and political knowledge).

51. See Meira Levinson, *The Civic Empowerment Gap: Defining the Problem and Locating Solutions*, in HANDBOOK OF RESEARCH ON CIVIC ENGAGEMENT 331-49 (Lonnie R. Sherrod, Judith Torney-Purta & Constance A. Flanagan eds., 2010); cf. James Weinberg, *Civic Education as an Antidote to Inequalities in Political Participation? New Evidence from English Secondary Education*, 17 BRIT. POL. 185, 186 (2021), <https://link.springer.com/article/10.1057/s41293-021-00186-4> [<https://perma.cc/X5T8-LXBB>].

52. *National Survey Finds Just 1 in 3 Americans Would Pass Citizenship Test*, INST. FOR CITIZENS & SCHOLARS (Oct. 3, 2018), <https://citizensandscholars.org/resource/national-survey-finds-just-1-in-3-americans-would-pass-citizenship-test/> [<https://perma.cc/B4DT-K8Y6>]; see also Annenberg Pub. Pol'y Ctr., *Americans' Civics Knowledge Drops on First Amendment and Branches of Government*, ANNENBERG SCH. FOR COMM'N (Sep. 13, 2022), <https://www.asc.upenn.edu/news-events/news/americans-civics-knowledge-drops-first-amendment-and-branches-government> [<https://perma.cc/8U6A-HZTW>].

societal interests. Urban, rural, and suburban low-income communities in particular lack sufficient resources for their schools.⁵³ President Trump has called for the establishment of a commission and programming to promote patriotism and celebration of the American founding and “a clear examination of how the United States has admirably grown closer to its noble principles throughout its history,” without directing any support for the tools of actual civic engagement.⁵⁴

Massachusetts mandated public schooling in 1647 and inspired similar efforts in other parts of the colonies, and ultimately in the United States.⁵⁵ Leading contributors to the U.S. Constitution advocated for governmental support of education.⁵⁶ The Framers of the U.S. Constitution did not, however, specify any support for schools or school finance and instead left the field to private actions and to state and local government.

As originally designed, the U.S. Constitution did not provide for broad self-government; voting was reserved for white men with wealth and access to education, although anyone could participate in town halls and protests.⁵⁷ The founding fathers feared demagogues and tried to guard against self-aggrandizing individuals who would destroy the checks and balances of the system.⁵⁸

53. See Lauren Camera, *In Most States, Poorest School Districts Get Less Funding*, U.S. NEWS & WORLD REP. (Feb. 27, 2018, at 00:01 ET), <https://www.usnews.com/news/best-states/articles/2018-02-27/in-most-states-poorest-school-districts-get-less-funding> [https://perma.cc/KD43-3ZFE].

54. Exec. Order No. 14190, 90 Fed. Reg. 8853 (Jan. 29, 2025).

55. See COLONIAL EXPERIENCE, *supra* note 41, at 180-85.

56. For example, in a letter to James Madison dated December 20, 1787, Jefferson explained his hope that “the education of the common people will be attended to” and stressed that preserving liberty rested on the “good sense” of a well-informed citizenry. *To James Madison from Thomas Jefferson, 20 December 1787*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://www.founders.archives.gov/documents/Madison/01-10-02-0210> [https://perma.cc/RFL4-9QY4]. He also introduced in the Virginia legislature the “Bill for the More General Diffusion of Knowledge” as an effort to promote individuals’ capacities for self-government. See *A Bill for the More General Diffusion of Knowledge*, 18 June 1779, Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079> [https://perma.cc/75AD-VNQ8].

57. See Dora Mekouar, *Today’s Democracy Isn’t Exactly What Wealthy US Founding Fathers Envisioned*, VOICE AM. (Jan. 24, 2021, at 07:00 ET), https://www.voanews.com/a/usa_all-about-america_todays-democracy-isnt-exactly-what-wealthy-us-founding-fathers-envisioned/6201097.html [https://perma.cc/9JAN-RVDJ].

58. See Eli Merritt, Opinion, *Why Demagogues Were the Founding Fathers’ Greatest Fear*, L.A. TIMES (Dec. 26, 2019, at 03:00 PT), <https://www.latimes.com/opinion/story/2019-12->

Concentrating power in the hands of elites was one answer, though John Adams worried about this feature of the original plan.⁵⁹ The Constitution arranged for senators to be elected through state legislatures until the ratification of the Seventeenth Amendment in 1913 established direct voter election of senators. The Senate's equal representation of small and big states, presidential elections determined by an Electoral College tilted toward the states with small populations, state laws producing winner-take-all selection of members of the Electoral College, and internal congressional rules such as the filibuster compound antidemocratic features of the system.⁶⁰

Even so, many of the drafters of the Constitution expressed keen commitment to broad education to prepare people for self-government. As Professor Derek Black has documented, two years before the Constitutional Convention, the Northwest Ordinance laid out plans for schools in the territories destined to become new states and asserted that "religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."⁶¹ George Washington and Thomas Jefferson both stressed the vital importance of education to consent of the governed and to self-government.⁶²

A generation after the founding, Horace Mann led a movement starting in the 1830s pressing successfully for free and universal "common schools."⁶³ Mann emphasized that schooling would not

26/demagogues-constitution-impeachment-washington-hamilton [https://perma.cc/GX62-FFF9] (citing letters of founding fathers).

59. See Luke Mayville, *Fear of the Few: John Adams and the Power Elite*, 47 POLITY 5, 6, 31 (2015).

60. Robert J. Shapiro, *The Senate Is Even More Anti-Democratic Than You Think*, WASH. MONTHLY (Apr. 12, 2023), <https://washingtonmonthly.com/2023/04/12/the-senate-is-even-more-anti-democratic-than-you-think/> [https://perma.cc/E8RW-9TAM].

61. DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY 13 (2020).

62. Thomas Jefferson reasoned that governments "deriv[e] their just powers from the consent of the governed," THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776), but that it is education that makes that consent possible. President Washington's last annual message to Congress urged expanding education in order to perpetuate the nation's common values and the chance of a "permanent union." BLACK, *supra* note 61, at 13-14; see MANVILLE & OBER, *supra* note 41, at 234.

63. See THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN

only help economic and social advancement, but also support the capacities of people needed by the nation's political structure.⁶⁴ Over the next several decades, public schooling expanded and nearly 80% of young people attended by 1870.⁶⁵ In the meantime, no Confederate state reentered the Union after the American Civil War without adopting a state guarantee of education.⁶⁶ Modern constitutional democracies, such as Germany and South Africa, explicitly commit to the right to education.⁶⁷ In the twentieth century, the Supreme Court has repeatedly acknowledged constitutional dimensions of education: The government may not use race in assigning students to schools,⁶⁸ and once a state provides education, it cannot exclude children who are not citizens if it provides schooling for those who are.⁶⁹ Concurring in one such decision, Justice Blackmun noted that "denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage."⁷⁰

Nonetheless, over fifty years ago, the Supreme Court rejected constitutional claims for greater equality in resources and declined to discern a right to education. In *San Antonio Independent School*

7-15 (Lawrence A. Cremin ed., 1957); JONATHAN MESSERLI, HORACE MANN: A BIOGRAPHY 263-64 (1971).

64. See MESSERLI, *supra* note 63, at 263-64.

65. JOHANN N. NEEM, DEMOCRACY'S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA 177 (2017); see CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860, at 185-88 (1983).

66. BLACK, *supra* note 61, at 15.

67. See Chrizzell Chürr, *Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany*, 18 POTCHEFSTROOM ELEC. L.J. 2404, 2408, 2424 (2015), <https://perjournal.co.za/article/view/1137> [<https://perma.cc/PKL7-QWHQ>]; Charter of Fundamental Rights of the European Union 83/02, art. 14, 2010 O.J. (C 83) 389, 394; KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 16-17, 19-22 (2012); Sandra Liebenberg, *The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 187, 206 (Katharine G. Young ed., 2019). Human rights conventions similarly embrace education. G.A. Res. 217 (III) A, art. 26, Universal Declaration of Human Rights (Dec. 10, 1948).

68. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

69. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 230 (1982). Some conservatives seek to overturn *Plyler v. Doe*, a decision which rejected the effort by Texas to exclude children of undocumented immigrants from public schools. *Id.*; see Emily Bazelon, *The Right-Wing Dream of 'Self-Deportation'*, N.Y. TIMES: MAG. (July 27, 2024), <https://www.nytimes.com/2024/07/27/magazine/the-right-wing-dream-of-self-deportation.html> [<https://perma.cc/8UVU-VZ3U>].

70. *Plyler*, 457 U.S. at 234 (Blackmun, J., concurring).

District v. Rodriguez, five Justices rejected the challenge to the school finance system in Texas that produced twice as much per-pupil expenditures in some communities as compared to others.⁷¹ And it did so while emphasizing the historic and ongoing importance of education to individuals and to society.⁷² Yet the *Rodriguez* opinion still left the door open to a constitutional claim when the government “fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”⁷³ Despite this possibility, lower courts—perhaps anticipating views of the current Supreme Court Justices—effectively closed the door to federal remedies for such failures.

Following the Supreme Court, in two recent decisions, federal courts have rejected constitutional recognition of a basic right to education.⁷⁴ Despite devastating factual findings of falling ceilings, pest infestations, classrooms staffed by unqualified individuals, and reliance on obsolete texts, a recent effort from Detroit to find a right to education in the federal Constitution failed.⁷⁵ So did a Rhode Island lawsuit to secure a right to civics education.⁷⁶

Litigation under state constitutions has led to notable remedies, but the U.S. Constitution is largely treated as a guarantee of “negative liberty”—that is, freedom from governmental restraints.⁷⁷

71. 411 U.S. 1, 6-13, 58-59 (1973); see Geoffrey R. Stone, *How a 1973 Supreme Court Decision Has Contributed to Our Inequality*, DAILY BEAST (May 15, 2014, at 05:45 ET), <https://www.thedailybeast.com/how-a-1973-supreme-court-decision-has-contributed-to-our-inequality> [<https://perma.cc/7NJM-9RB9>].

72. *Rodriguez*, 411 U.S. at 29-30 (“Compulsory school attendance laws and the great expenditures for education both demonstrate [the Court’s] recognition of the importance of education to our democratic society.... It is the very foundation of good citizenship.” (quoting *Brown*, 347 U.S. at 493)).

73. *Id.* at 37.

74. See Gary B. v. Whitmer, 957 F.3d 616, 624-26 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020); A.C. *ex rel.* Waithe v. McKee, 23 F.4th 37, 48 (1st Cir. 2022); see also Martha Minow, *San Antonio Independent School District v. Rodriguez at Fifty: Contingencies, Consequences, and Calls to Action*, 55 LOY. U. CHI. L.J. 363, 383-90 (2023) (discussing the impacts of *Rodriguez* and advocates’ efforts to promote equal educational opportunities); Martha Minow, *Education: Constitutional Democracy’s Predicate and Product*, 73 S.C. L. REV. 537, 556-57 (2022) [hereinafter *Predicate and Product*] (examining recent litigation advocating for recognition of federal educational rights).

75. *Gary B.*, 957 F.3d at 624-26.

76. *Waithe*, 23 F.4th at 48.

77. See Robert H. Bork, Commentary, *The Impossibility of Finding Welfare Rights in the*

The distinction between negative and positive liberties in the eyes of many, including me, does not seem coherent.⁷⁸ For example, to ensure procedural protections against arbitrary governmental deprivations of life, liberty, or property, the government has to provide affirmative structures that cost resources.⁷⁹ Is it so different to ensure the educational predicate for elections and jury service? Concerns that courts are not well equipped to adjudicate the scope of a right to education are belied by historical and comparative examples.⁸⁰ Courts can play a critical role in convening other actors, such as legislators and executive leaders, to develop plans of action that fall within their competencies; courts also can set up procedures for community members to engage with governmental officials in designing steps and experiments.⁸¹ A step-by-step, evolving approach is precisely how the South African Constitutional Court has developed and filled in the right to education under its nation's constitution.⁸²

Future federal litigation in the United States could assert and persuade a different Supreme Court to acknowledge a federal constitutional right to education. Even the current Court might be responsive to arguments framed in the historical, "originalist" terms that a majority of its members prefer.⁸³

Meanwhile, federal constitutional arguments for education matters hold significance in quarters other than the U.S. Supreme

Constitution, 1979 WASH. U. L.Q. 695; David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865-67 (1986). For a discussion and critique of this dominant view about the U.S. Constitution, see Emily Zackin, *Positive Rights*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 718 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015).

78. See Frank I. Michelman, *Good Government, Core Liberties, and Constitutional Property: An Essay for Joe Singer*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 27, 27-28 (2016); *Predicate and Product*, *supra* note 74, at 553-54; Zackin, *supra* note 77, at 717-21.

79. See *Predicate and Product*, *supra* note 74, at 542, 554, 556-58, 572-73.

80. See Oliver Gerstenberg, *Negative/Positive Constitutionalism, "Fair Balance," and the Problem of Justiciability*, 10 INT'L J. CONST. L. 904, 905, 915-24 (2012).

81. See *id.*; Lucky Mathebe, *The Constitutional Court of South Africa: Thoughts on Its 25-Year-Long Legacy of Judicial Activism*, 56 J. ASIAN & AFR. STUD. 18, 20-22, 26, 28-29 (2021).

82. See Lorette Arendse, *Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-Juma Musjid*, 20 AFR. HUM. RTS. L.J. 285, 291-92 (2020).

83. See Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1063-64, 1068, 1112-13 (2019).

Court.⁸⁴ State courts and legislatures iteratively articulate and enforce education rights under state constitutions at the prompting of advocates and in dialogue with the government and other participants.⁸⁵ Legislative efforts by public officials, including legislators, who swear an oath to uphold and implement the U.S. Constitution can be guided by constitutional arguments.⁸⁶ So can voters, students, and parents.⁸⁷ Effective social movements in America have repeatedly deployed the language of constitutional rights to help empower individuals and communities.⁸⁸ Just as mass efforts have advanced self-government and individual rights in movements for labor rights, civil rights, and rights to vote and to marry who you love, educational opportunity could motivate and

84. See *Predicate and Product*, *supra* note 74, at 564-66.

85. State courts in the United States have articulated what education rights under their state constitutions require in cases developed over time and in dialogue with other branches of government. See Andy Froelich, *In the Courts: A Constitutional Right to an Education: Revisited*, 40 CHILD. & LEGAL RTS. J. 159, 162 (2020); Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 3-8; Larry J. Obhof, *School Finance Litigation and the Separation of Powers*, 45 MITCHELL HAMLINE L. REV. 536, 556-60 (2019); Josh Weishart, *In the Education Culture War, Don't Overlook State Constitutions*, STATE CT. REP. (Mar. 6, 2023), <https://statecourtreport.org/our-work/analysis/opinion/education-culture-war-dont-overlook-state-constitutions> [https://perma.cc/4XN6-7YDJ].

86. For a detailed analysis of federal legislative education right possibilities guided by the Constitution, see Kimberly Jenkins Robinson, *A Congressional Right to Education: Promises, Pitfalls, and Politics*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 186, 186-202 (Kimberly Jenkins Robinson ed., 2019); Kimberly Jenkins Robinson, *A Proposal for Collaborative Enforcement of a Federal Right to Education*, in WHAT IS RIGHT FOR CHILDREN?: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 205, 205-27 (Martha Albertson Fineman & Karen Worthington eds., 2009).

87. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1256-57 (1978); Alan Garfield, Opinion, *In Divisive Times, the Constitution Binds Us Together as Americans*, DEL. ONLINE (Sep. 13, 2018, at 08:17 ET), <https://www.delawareonline.com/story/opinion/contributors/2018/09/13/divisive-times-constitution-binds-us-together-americans/1280204002/> [https://perma.cc/G9PT-K6TL]. For cautions, see Mark Tushnet, Book Review, 116 ETHICS 607, 607 (2006) (reviewing LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004)).

88. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1879-80 (1987); see also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1327 (2006) (demonstrating how social movements can shape the Constitution's meaning). On the role of the Constitution in symbolic meanings for society, see MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 68-92 (1986).

mobilize legislation and judicial action for educational opportunities.⁸⁹

Education matters for constitutional democracy because the structural elements of the Constitution alone cannot guard against voters falling under the sway of demagogues. For that, a society needs a populace, as Thomas Jefferson put it, educated to “enable every man to judge for himself what will secure or endanger his freedom.”⁹⁰ Education can and must equip each new generation to engage in the acts of self-governance, to respect the rights of others and the demands of political participation, and to act with vigilance to preserve and strengthen constitutional democracy.

These are not just nice-to-haves. A society that fails at a minimum to seek respect for each person as a worthy participant engenders resentment and instability.⁹¹ The same goes for persistent chasms between people’s expressed wishes and actual governance. As Richard Kahlenberg and Clifford Janey put it, schools should “instill a love of liberal democracy: a respect for the separation of powers, for a free press and free religious exercise, and for the rights of political minorities. In this way, demagogues who sought to undermine those institutions would themselves be suspect among voters.”⁹² No one can mandate freedom from anger, hatred, prejudice, or self-aggrandizement, but experiences and opportunities to learn can support conditions for forbearance, acceptance, and cooperation.⁹³ Efforts to cultivate commitment to democracy could include a year of universal national service for people in their late

89. See generally Siegel, *supra* note 88 (discussing the impact of the women’s movement on gender equality, antidiscrimination law, and Constitutional interpretation).

90. RICHARD D. KAHLENBERG & CLIFFORD JANEY, CENTURY FOUND., PUTTING DEMOCRACY BACK INTO PUBLIC EDUCATION 3 (2016) (quoting Letter from Thomas Jefferson to John Tyler (May 26, 1810)), <https://production-tcf.imgix.net/app/uploads/2016/11/10195924/Putting-Democracy-Back-into-Public-Education1.pdf> [<https://perma.cc/V9VM-NUTK>].

91. See CALHOUN ET AL., *supra* note 5, at 128; RUNCIMAN, *supra* note 4, at 170-89.

92. KAHLENBERG & JANEY, *supra* note 90, at 3.

93. See U.S. DEPT OF STATE, REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS 58 (2020), <https://2017-2021.state.gov/report-of-the-commission-on-unalienable-rights/> [<https://perma.cc/8RXV-W9WP>] (“The surest protection of human freedom and dignity comes from the constitutions of free and democratic states undergirded by a tolerant, rights-respecting culture. As in the case of the United States’ distinctive rights tradition, the maintenance of the international human rights project will require attention to the ‘small places’ where the spirit of liberty is rooted, nurtured, and cultivated.”).

teens as recommended by the American Academy of Arts and Sciences commission on public purpose.⁹⁴

Strikingly, founders of this nation expressed very similar concerns not long after the launching of the nation. John Jay—then Secretary of Foreign Affairs under the Articles of Confederation—wrote George Washington the year before the Constitutional Convention about his concern for a lack of foundational commitments to the values of liberty, independence, and self-governance: “[W]e are yet to become a great and respectable People.”⁹⁵ John Jay continued,

What I most fear is, that the better kind of People—(by which I mean the People who are orderly and industrious, who are content with their situations and not uneasy in their Circumstances,) will be led by the Insecurity of Property, the Loss of Confidence in their Rulers, & the Want of public Faith & rectitude, to consider the Charms of Liberty as imaginary and delusive.⁹⁶

George Washington, who returned to his plantation in Virginia after eight years of war, wrote back to Jay: “I am told that even respectable characters speak of a monarchical form of government without horror.... What a triumph for the advocates of despotism to find that we are incapable of governing ourselves, and that systems founded on the basis of equal liberty are merely ideal & fallacious!”⁹⁷

94. See COMM’N ON THE PRAC. OF DEMOCRATIC CITIZENSHIP, OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 9 (2020), <https://www.amacad.org/ourcommonpurpose/report> [<https://perma.cc/D29B-UW4H>].

95. *John Jay to George Washington, 27 June 1786*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/04-04-02-0129> [<https://perma.cc/TNT2-A5JZ>].

96. *Id.*

97. *George Washington to John Jay, 15 August 1786*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/04-04-02-0199> [<https://perma.cc/6RHJ-UKH5>]. James Russell Lowell, poet and abolitionist, wrote,

But have you ever rightly considered what the mere ability to read means? That it is the key which admits us to the whole world of thought and fancy and imagination? to the company of saint and sage, of the wisest and the wittiest at their wisest and wittiest moment? That it enables us to see with the keenest eyes, hear with the finest ears, and listen to the sweetest voices of all time?

JAMES RUSSELL LOWELL, *DEMOCRACY AND OTHER ADDRESSES* 115 (1886).

Self-government works only if people take up the responsibility to participate and give the time and energy to inform themselves, to vote, and to hold officials accountable. Even an educated and rights-respecting populace cannot make a constitutional democracy work if the people cannot locate and receive reliable information and competing opinions about what government is doing and proposing, candidates for office, the conduct of powerful players, and the needs of neighbors. The digital revolution opens both promise and jeopardy, content and noise, by giving access to all of human knowledge but also to misinformation and disinformation and materials circulating freely without vetting. The task of education for discernment is urgent and essential if constitutional democracy is to survive.

II. NEWS AND INFORMATION

I suggest that the second fundamental prerequisite for constitutional democracy is access to reliable news and information. The U.S. Constitution provides explicit protection for only one private industry: the press.⁹⁸ The Constitution also empowered Congress to create a postal service.⁹⁹ The early Congress joined the two elements by establishing discounted postal rates for newspapers and the free exchange of newspapers between news printers and publishers.¹⁰⁰ A scholar observed in a comparative study of speech in constitutional democracies, “A free press is obviously essential to democratic self-government. After all, how can citizens cast well-informed ballots on election day in the absence of truthful and accurate information about the pressing public policy issues of the day?”¹⁰¹

Yet there have been economic and technological assaults on the sustainability, independence, and vigor of private media. A related

98. U.S. CONST. amend. I.

99. U.S. CONST. art. I, § 8, cl. 7.

100. MARTHA MINOW, *SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH* 42-43, 54-55 (2021) [hereinafter *SAVING THE NEWS*]. For both historical origins and more recent developments of such policies, see RICHARD B. KIELBOWICZ, *NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700-1860S*, at 31-37, 141-48 (1989); KEVIN R. KOSAR, *CONG. RSCH. SERV.*, R40162, *POSTAGE SUBSIDIES FOR PERIODICALS: HISTORY AND RECENT DEVELOPMENTS* 2-3 (2009).

101. RONALD J. KROTOSZYNSKI, JR., *FREE SPEECH AS CIVIC STRUCTURE: A COMPARATIVE ANALYSIS OF HOW COURTS AND CULTURE SHAPE THE FREEDOM OF SPEECH* 122 (2024).

threat is the amplification of misinformation and disinformation, especially as propelled through digital communications. False or misleading information distributed online, through broadcasts, or cable—whether shared with or without intention to mislead and deceive—can jeopardize the health, safety, and well-being of individuals and pave the way to destabilize society and disrupt democracy.¹⁰² Repeated studies show that those communities lacking local news experience lower voter turnout and other political participation as well as higher levels of public and private corruption.¹⁰³

History offers insights into the sources and significance of the central importance of news access to democracy. As printed media became integral to British and American societies, ideas about freedom, popular governance, and resisting tyranny circulated through independent and competing outlets.¹⁰⁴ Journalists employed by news media investigated the conduct of governments, businesses, and communities.¹⁰⁵ Those medias long depended on a combination of subscriptions and advertising revenues.¹⁰⁶

102. Sophia Marjanovic, *What's the Difference Between Disinformation and Misinformation?*, EQUATION: BLOG (Mar. 15, 2023, at 12:18 ET), <https://blog.ucsusa.org/sophia-marjanovic/whats-the-difference-between-disinformation-and-misinformation/> [https://perma.cc/9YZA-XKUJ].

103. On voting, see generally Martin Baekgaard, Carsten Jensen, Peter B. Mortensen & Søren Serritzlew, *Local News Media and Voter Turnout*, 40 LOC. GOV'T STUD. 518 (2014); Christopher Chapp & Peter Aehl, *Newspapers and Political Participation: The Relationship Between Ballot Rolloff and Local Newspaper Circulation*, 42 NEWSPAPER RSCH. J. 235 (2021); Danny Hayes & Jennifer L. Lawless, *The Decline of Local News and Its Effects: New Evidence from Longitudinal Data*, 80 J. POL. 332 (2018); David Hughes, *Does Local Journalism Stimulate Voter Participation in State Supreme Court Elections?*, 8 J. L. & CTS. 95 (2020). On declines in local news and increases in corruption, see Kriston Capps, *The Hidden Costs of Losing Your City's Newspaper*, BLOOMBERG (May 30, 2018, at 09:07 ET), <https://www.bloomberg.com/news/articles/2018-05-30/when-local-newspapers-close-city-financing-costs-rise> [https://perma.cc/33FG-YE2J]; Ted Matherly & Brad N. Greenwood, *No News Is Bad News: Political Corruption, News Deserts, and the Decline of the Fourth Estate*, 2021 AC. MGMT. 1, 3-5, <https://www.semanticscholar.org/paper/No-News-is-Bad-News%3A-Political-Corruption%2C-News-and-Matherly-Greenwood/545f14dc04ef25e3927cc940f43208b43b3c43e1> [https://perma.cc/3734-EPCY]; Steven Waldman, *The Local-News Crisis Is Weirdly Easy to Solve*, ATLANTIC: IDEAS (Aug. 8, 2023), <https://www.theatlantic.com/ideas/archive/2023/08/local-news-investment-economic-value/674942/> [https://perma.cc/FEG5-RFSW].

104. MANVILLE & OBER, *supra* note 41, at 209-11.

105. *See id.* at 210-11.

106. *See infra* notes 110-12.

Digital communications businesses disrupted these sources of funding.¹⁰⁷ Social media platforms enable people to post and receive information without paying subscriptions and to share journalists' copyrighted materials without paying for their use. Audiences for conventional media have largely dwindled over the past decade.¹⁰⁸ Willingness to pay subscriptions for printed media has dissipated.¹⁰⁹ Advertising funds are reallocated from print, broadcast, and cable communications to digital media.¹¹⁰ The phenomenon is global.¹¹¹ As ads migrate to digital platforms, the traditional media turns often to those very platforms to distribute their content—and big tech companies take a large share of ad revenues.¹¹² These declines are especially notable and accelerating in local news.¹¹³ Recent reports indicate that even the term “news desert” is inadequate to describe the problem, because local news is disappearing across the

107. *See infra* note 110.

108. Michael Lipka & Elisa Shearer, *Audiences Are Declining for Traditional News Media in the U.S.—With Some Exceptions*, PEW RSCH. CTR. (Nov. 28, 2023), <https://www.pewresearch.org/short-reads/2023/11/28/audiences-are-declining-for-traditional-news-media-in-the-us-with-some-exceptions> [https://perma.cc/22P6-W36E].

109. *Id.*

110. *Id.*; *see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105405, LOCAL JOURNALISM: INNOVATIVE BUSINESS APPROACHES AND TARGETED POLICIES MAY HELP LOCAL NEWS MEDIA ADAPT TO DIGITAL TRANSFORMATION 6-7, 14-17 (2023); Phillip Longman, *How Fighting Monopoly Can Save Journalism*, WASH. MONTHLY (Jan. 16, 2024), <https://washingtonmonthly.com/2024/01/16/how-fighting-monopoly-can-save-journalism/> [https://perma.cc/J55M-U79N]. There is some evidence that media industry consolidation had already hollowed out newspapers before online advertising started. *See* Cory Doctorow, *Saving the News from Big Tech*, ELEC. FRONTIER FOUND. (May 17, 2023), <https://www.eff.org/deeplinks/2023/04/saving-news-big-tech> [https://perma.cc/SDR5-VXNT].

111. *See* Sameer Padania, Emma Goodman, Louise Anglès-d'Auriac, Camille Grenier, Thibaut Bruttin & Iris de Villars, *What Governments Can Do to Preserve the Press: A New Deal for Journalism*, GLOB. INVESTIGATIVE JOURNALISM NETWORK (July 1, 2021), <https://gijn.org/stories/what-governments-can-do-to-preserve-the-press-a-new-deal-for-journalism/> [https://perma.cc/3945-GRYX]; ANYA SCHIFFRIN, JULIE POSETTI, FRANCESCA EDGERTON & EMILY BELL, UNESCO, FINDING THE FUNDS FOR JOURNALISM TO THRIVE: POLICY OPTIONS TO SUPPORT MEDIA VIABILITY 1, 9-12 (2022), <https://unesdoc.unesco.org/ark:/48223/pf0000381146?posInSet=1&queryId=7e7647f9-d393-44e2-b9f2-049243abc2a9> [https://perma.cc/U5B8-XUT8].

112. *See* Doctorow, *supra* note 110.

113. *See* PENELOPE MUSE ABERNATHY, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? 31-35 (2020), https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf [https://perma.cc/ESQ2-JNWW]; David Bauder, *Decline in Local News Outlets Is Accelerating Despite Efforts to Help*, AP NEWS (Nov. 16, 2023, at 10:30 ET), <https://apnews.com/article/local-newspapers-closing-jobs-3ad83659a6ee070ae3f39144dd840c1b> [https://perma.cc/6A2P-PNQK].

United States.¹¹⁴ Legacy media entities are shrinking or closing: Newspapers across the country have shut down at a rate of two-and-a-half newspapers per week, and nearly two-thirds of American journalists have lost their jobs within the last twenty years.¹¹⁵ Illinois alone has lost 86 percent of its newspaper jobs since 2005.¹¹⁶ Even heralded innovations, such as nonprofit digital news groups, face severe economic challenges.¹¹⁷

More than a decade ago, the Federal Communications Commission identified these trends as well as the dangers of misinformation and disinformation in a report on the information needs of communities.¹¹⁸ That report largely resisted governmental support assistance, yet in the face of accelerating negative trends, its lead author Steven Waldman now advocates for a variety of governmental support efforts.¹¹⁹ Recently, veteran journalist Sewell Chan assessed that effort as “timid and constricted,” with a “hands-off

114. John Nichols, *Local News Has Been Destroyed. Here's How We Can Revive It*, NATION (Dec. 12, 2023), <https://www.thenation.com/article/society/local-news-revival-plan/> [https://perma.cc/4TDN-4APQ].

115. See Zach Metzger, *The State of Local News: The 2024 Report*, LOC. NEWS INITIATIVE (Oct. 23, 2024), <https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2024/report/> [https://perma.cc/ZNH6-T3TG]; Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RSCH. CTR. (July 13, 2021), <https://www.pewresearch.org/short-reads/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/> [https://perma.cc/4GM8-FYCW]; Angela Fu, Ren LaForme & Tom Jones, *Media Industry Cuts Top 20,000 in 2023, Report Finds*, POYNTER (Dec. 8, 2023), <https://www.poynter.org/commentary/2023/media-industry-cuts-top-20000-in-2023-report-finds/> [https://perma.cc/4Q6W-U597].

116. Amy Yee, *As Newspapers Close Across the U.S., Study Finds Illinois Is Hard Hit*, CHI. SUN. TIMES (Dec. 2, 2024, at 16:23 ET), <https://chicago.suntimes.com/money/2024/12/02/newspapers-close-across-us-medill-study-finds-illinois-hard-hit> [https://perma.cc/42WJ-K2FR].

117. See George Stanley, *Rethinking the Texas Tribune Model*, NW. UNIV.: LOC. NEWS INITIATIVE (2023), <https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2023/brightspots/texas-tribune-sewell-chan-q-and-a/> [https://perma.cc/2TEW-5N8S].

118. See STEVEN WALDMAN & WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FCC, *THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE* (2011), <https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf> [https://perma.cc/V5DG-R5P7].

119. See Nikki Usher, Joshua P. Darr, Philip M. Napoli & Michael L. Miller, *Media Policy for an Informed Citizenry: Revisiting the Information Needs of Communities for Democracy in Crisis*, 707 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 18 (2023) (“Steven Waldman, lead author of the FCC Information Needs Report, now leads Rebuild Local News, a coalition of more than 3,000 local news providers and associated groups that advocates for government assistance for local news.”).

approach to media policy.”¹²⁰ Billionaires who purchase media outlets may offer some shelter from the financial forces but often choose cuts when faced with financial losses.¹²¹ Hence, the behavior of wealthy and consolidating owners may in fact contribute to the massive layoffs of journalists and downward spiral of the media industry.¹²²

Strong local journalism strengthens voting, assessment of political candidates, and public benefits such as trust and reduced public and private corruption.¹²³ When journalism shrinks, corruption increases and voting declines.¹²⁴ Weakness in local journalism hurts democracy. Active journalism, in contrast, correlates with reduced toxic emissions, lower hospital admissions due to food poisoning, effective criminal justice reforms, and higher return on community bonds.¹²⁵ Information changes behavior. The duties of self-governing citizens include understanding the issues of the day and assessing

120. Sewell Chan, *A Lost Decade: Policymakers Fiddled as Newsrooms Burned*, 707 ANNALS AM. ACAD. POL. & SOC. SCI. 62, 66 (2023).

121. See Nichols, *supra* note 114; Benjamin Mullin & Katie Robertson, *Billionaires Wanted to Save the News Industry. They're Losing a Fortune.*, N.Y. TIMES (Jan. 18, 2024), <https://www.nytimes.com/2024/01/18/business/media/billionaires-news-media-owners.html> [<https://perma.cc/V8N3-NFDA>].

122. See LZ Granderson, *Can the U.S. Ever Recover from Rupert Murdoch's Exploitation?*, L.A. TIMES: VOICES (Sep. 26, 2023), <https://www.latimes.com/opinion/story/2023-09-26/rupert-murdoch-fox-news-journalism> [<https://perma.cc/N3WT-2RJ5>]; Katherine Reynolds Lewis, Opinion, *Hey Journalists, Nobody Is Coming to Save Us*, NIEMAN REPS. (Oct. 24, 2023), <https://niemanreports.org/articles/journalism-layoffs-buyouts/> [<https://perma.cc/UM6E-5FX9>]. An empirical study shows reductions in numbers of journalists have followed purchases of news outlets by investor owners. Erik Peterson & Johanna Dunaway, *The New News Barons: Investment Ownership Reduces Newspaper Reporting Capacity*, 707 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 76 (2023) (finding 14% reduction in staffing following acquisitions of newspapers between 2005 and 2022).

123. See Josh Stearns, *How We Know Journalism Is Good for Democracy*, DEMOCRACY FUND: BLOG (Sep. 15, 2022), <https://democracyfund.org/idea/how-we-know-journalism-is-good-for-democracy/> [<https://perma.cc/6TR6-P8C8>].

124. See Penny Muse Abernathy, *Why Local News Matters, and What We Can Do to Save It*, N.Y. STATE BAR ASS'N (Dec. 1, 2019), <https://nysba.org/why-local-news-matters-and-what-we-can-do-to-save-it/> [<https://perma.cc/3XTU-CRKY>]; Catherine Buni, *Meet the States Using Public Funding to Support Local Journalism*, NIEMAN REPS.: FEATURES (Feb. 8, 2023), <https://niemanreports.org/state-public-funding-local-news/> [<https://perma.cc/S4HS-HBRS>]; see PEN AM., *LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS* 5, 14 (2019), https://pen.org/wp-content/uploads/2024/07/2019_Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf [<https://perma.cc/4HK9-VEW9>]; Waldman, *supra* note 103.

125. See *supra* notes 110-11 and accompanying text.

options in response.¹²⁶ In the past, media helped communities develop a common identity, while balkanized media reflects and amplifies polarization and tribalism.¹²⁷ News organizations not only reflect but also help give form to a “public,” a community of shared interests.¹²⁸ Journalists, in effect, invite people to identify with a community and also stand in for the polity in holding those in power accountable.¹²⁹ When the press loses its viability—when it disappears or when trust in it fades—social trust and the sense of participation in a shared community also dissipate.

It is sobering that Donald Trump, both as a presidential candidate and while in office, attacked the media and threatened to suppress the press.¹³⁰ He has pursued multiple lawsuits against media for defamation and banned the Associated Press from the Oval Office, press conference space at the White House, and Air Force One after the Associated Press declined to change its designation of a geographic space—known as the “Gulf of Mexico”—to the “Gulf of America,” the name preferred by the President.¹³¹

126. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) (“The responsibilities mentioned are of three kinds. We, the people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness.”); OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (1996) (linking the value of free expression to collective self-determination).

127. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 163 (rev. ed. 2006).

128. See Charles B. Forcey, *Bringing the Press Back In: Essays on the Power of News in American Political Life*, H-NET: REVIEWS (Sep. 1997), <https://www.h-net.org/reviews/showrev.php?id=1270> [<https://perma.cc/7XCT-ZJK9>] (reviewing MICHAEL SCHUDSON, *THE POWER OF NEWS* (1995)); Michael Schudson, *Why Conversation Is Not the Soul of Democracy*, 14 CRITICAL STUD. MASS COMMUN. 297, 305 (1997).

129. See Forcey, *supra* note 128.

130. See Liam Reilly, *Trump Has Long Threatened the Media. Press Freedom Groups Fear He Might Make Good on It*, CNN: BUS. (Nov. 7, 2024, at 06:00 ET), <https://www.cnn.com/2024/11/07/media/trump-news-media-press-freedom-threats/index.html> [<https://perma.cc/B8Q7-Q5RL>]; see PEN AM., *TRUMP THE TRUTH: FREE EXPRESSION IN THE PRESIDENT'S FIRST 100 DAYS* 9-10 (Apr. 27, 2017), https://pen.org/wp-content/uploads/2024/06/2017_PEN_Trump_Truth_v3_low-res.pdf [<https://perma.cc/W8FH-J93B>].

131. David Enrich, *Trump's New Line of Attack Against the Media Gains Momentum*, N.Y. TIMES (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/business/media/trump-media-law-suits.html> [<https://perma.cc/Z8M3-3XXJ>]; Kathryn Watson, *White House Bars Associated Press from Spaces Like Oval Office and Air Force One*, CBS NEWS (Feb. 14, 2025, at 15:57 ET), <https://www.cbsnews.com/news/white-house-bars-associated-press-oval-office-air-force-one/>

Responding to earlier verbal attacks on media, Senator John McCain, Republican candidate for the presidency of the United States a few cycles ago, told the host of a news broadcast, “I hate the press. I hate you especially.”¹³² He continued:

But the fact is we need you. We need a free press. We must have it. It’s vital. If you want to preserve—I’m very serious now—if you want to preserve democracy as we know it, you have to have a free and many times adversarial press.... And without it, I am afraid that we would lose so much of our individual liberties over time. That’s how dictators get started.¹³³

Who will stand up for the media? Media leaders may not do so themselves when their owners fear retribution by the administration. Having other business interests beyond media, media companies include conglomerates, like Disney (the owner of the American Broadcasting Company, or ABC), and are often owned by wealthy individuals, such as Jeff Bezos (the owner of the *Washington Post* and largest shareholder of Amazon).¹³⁴ When Donald Trump became president-elect, ABC settled the defamation lawsuit he had brought against it; after Trump’s election to serve a second term, *Washington Post* owner Bezos announced and enforced new editorial policies to promote free markets and personal liberties while stifling criticism in the *Washington Post* of Bezos himself.¹³⁵

[<https://perma.cc/KK6D-AVL2>].

132. Chuck Todd, Phil Helsel & Matt Rivera, *McCain Warns Suppressing Press ‘Is How Dictators Get Started’*, NBC NEWS (Feb. 19, 2017, at 21:35 ET), <https://www.nbcnews.com/meet-the-press/mccain-warns-suppressing-press-how-dictators-get-started-n722906> [<https://perma.cc/M46Z-CYRD>] (quoting McCain’s statements from an interview with Chuck Todd).

133. *Id.*

134. See Mathew Johnston, *7 Companies Owned by Disney*, INVESTOPEDIA (Nov. 6, 2024), <https://www.investopedia.com/articles/markets/102915/top-5-companies-owned-disney.asp> [<https://perma.cc/5FT6-WFMC>]; Nathan Reiff, *Top Amazon Shareholders*, INVESTOPEDIA (Sep. 23, 2023), <https://www.investopedia.com/articles/insights/052816/top-4-amazon-shareholders-amzn.asp> [<https://perma.cc/X798-SGCN>].

135. Paula Reid & Katelyn Polantz, *ABC News Settles Defamation Suit with Trump for \$15 Million*, CNN (Dec. 14, 2024, at 16:56 ET), <https://www.cnn.com/2024/12/14/politics/trump-abc-news-defamation-lawsuit-settle/index.html> [<https://perma.cc/C63J-BHAZ>]; Richard Luscombe, *Washington Post Opinion Editor Departs as Bezos Pushes to Promote ‘Personal Liberties and Free Markets’*, GUARDIAN (Feb. 26, 2025, at 17:55 ET), <https://www.theguardian.com/media/2025/feb/26/jeff-bezos-washington-post-opinion> [<https://perma.cc/JKG4-AQ8T>]; David Bauder, *Washington Post Columnist Quits After Her Opinion Piece Criticizing*

What reforms can be framed that do not reduce the independence of journalism, do not increase industry consolidation, and do not benefit financial investors who buy into media only to strip it for parts?¹³⁶ Could public and private investments strengthen avenues for new forms of journalism and new journalists—even if unbundled from conventional media outlets and distribution systems?¹³⁷ Philanthropy, nonprofit newsrooms, and other forms of support can assist the development of powerful news stories and journalism appealing to diverse audiences.¹³⁸ Public contributions, ranging from tax credits and deductions to investments in public media and resources for journalism, are also possible reforms.

Constitutional objections greet reform proposals calling for public revenues and government involvement. Such objections are overstated and contrary to longstanding federal and state involvement in financing and structuring the media ecosystem.¹³⁹ A variety of public actions in the United States have tried to strengthen, change, and support accurate news sources.¹⁴⁰ The First Amendment in the U.S. Constitution prohibits Congress from making any law that “[abridges] the freedom of speech, or of the press.”¹⁴¹ “First Amendment absolutism”—as named by media studies scholar Victor Pickard—may seem to bar any governmental action financing or even affecting media organizations.¹⁴²

Owner Jeff Bezos Is Rejected, AP NEWS (Mar. 10, 2025, at 21:55 ET), <https://apnews.com/article/washington-post-resignation-marcus-bezos-8d6ce32b27f5c965fc972d73d0f95aac> [<https://perma.cc/YPV9-LCT8>].

136. See Paul Matzko, *A Link Tax Won't Save the Newspaper Industry*, CATO INST.: POL'Y ANALYSIS (Aug. 14, 2023), <https://www.cato.org/policy-analysis/link-tax-wont-save-newspaper-industry> [<https://perma.cc/52E9-H552>].

137. See *id.* (discussing TikTok posts and Substack columnists).

138. David Leonhardt & Lyna Bentahar, *The Rebirth of Local Journalism*, N.Y. TIMES: BRIEFING (Dec. 22, 2023), <https://www.nytimes.com/2023/12/22/briefing/local-journalism.html> [<https://perma.cc/42ZU-KKX3>]; Longman, *supra* note 110 (discussing philanthropic and nonprofit efforts as well as suggesting antitrust enforcement).

139. See Martha Minow, *Are We Saving the News?*, KNIGHT FIRST AMEND. INST.: BLOG (June 20, 2024), <https://knightcolumbia.org/blog/are-we-saving-the-news> [<https://perma.cc/6RXP-6DQ5>].

140. See VICTOR PICKARD, *DEMOCRACY WITHOUT JOURNALISM? CONFRONTING THE MISINFORMATION SOCIETY* 19030 (2020).

141. U.S. CONST. amend. I.

142. See PICKARD, *supra* note 140, at 51; Ashton Yount, *Democracy Without Journalism? Q&A with Victor Pickard*, ANNENBERG SCH. FOR COMM'C'N (Nov. 25, 2019), <https://www.asc.upenn.edu/news-events/news/democracy-without-journalism-qa-victor-pickard> [<https://perma.cc/PYV8-KJC3>].

This is a false view. Look at how Congress in 1792 exercised authority specified in the Constitution to create a postal service—it authorized the free exchange of newspapers among printers and publishers while discounting the rates for delivering newspapers to all other readers.¹⁴³ State and local governments subsidized newspapers, and later communications technologies, with tax exemptions. The federal government invested in the first telegraph line and later established the licensing system for broadcasting with only nominal fees. Courts have shielded newspapers from a state tax targeting the press and from antitrust threats to the Associated Press, the cooperative service allowing outlets to pool some of the costs of newsgathering in order to enlarge and improve journalism and media. And the federal government has subsidized the development of radio, television, cable, communications satellites, internet, and public media on radio, television, and the web.¹⁴⁴ Vigilance against government suppression of speech is crucial and can be ensured by insulating editorial and content choices from government support and regulation. Collective efforts may be crucial to redress anticompetitive behavior, historic lack of racial and economic diversity in communications media, and the longstanding lack of attention to many communities.¹⁴⁵

143. RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 36 (2d prt. 1998); KIELBOWICZ, *supra* note 100, at 34-35.

144. *See* SAVING THE NEWS, *supra* note 100, at 52, 55, 57 (2021). On government efforts to tackle concentrated control and structural reforms of the information ecosystem, see Victor Pickard, *The Great Reckoning: Lessons from 1940s Media Policy Battles*, KNIGHT FIRST AMEND. INST. (Feb. 24, 2022), <https://knightcolumbia.org/content/the-great-reckoning> [<https://perma.cc/GZ89-SH5S>].

145. *See* Victor Pickard, *We Need a Media System That Serves People's Needs, Not Corporations*, JACOBIN (Jan. 27, 2020), <https://jacobin.com/2020/01/corporate-media-system-democracy> [<https://perma.cc/6N9A-7P4A>]; Victor Pickard, *American Journalism Is Dying. Its Survival Requires Public Funds*, GUARDIAN (Feb. 19, 2020, at 08:34 ET), <https://www.theguardian.com/commentisfree/2020/feb/19/american-journalism-press-publishing-mcclatchy> [<https://perma.cc/CV3T-PW5U>]; Craig Aaron, *Journalism Needs a Stimulus. Here's What It Should Look Like*, COLUM. JOURNALISM REV. (Mar. 24, 2020), <https://www.cjr.org/analysis/journalism-stimulus.php> [<https://perma.cc/6ZR3-QSHB>]; Dan V. Kozlowski, *Positive First Amendment*, in *THE SAGE ENCYCLOPEDIA OF JOURNALISM* 1277-79 (Gregory A. Borchard ed., 2022). Digital platforms and algorithmic practices may exacerbate inequities rather than remedy historic inattention to marginalized communities and their news needs. *See* Kokil Jaidka, Sean Fischer, Yphtach Lelkes & Yifei Wang, *News Nationalization in a Digital Age: An Examination of How Local Protests Are Covered and Curated Online*, 707 ANNALS AM. ACAD. POL. & SOC. SCI. 189, 192 (2023).

Promising developments include investments by philanthropic donors in existing and new journalism—a coalition of philanthropies has promised more than \$500 million.¹⁴⁶ This is private action, but governmental tax treatment for both donors and recipient entities amplifies it. Local groups in some cases have repurchased media outlets once bought by large chains or private equity.¹⁴⁷ For-profit but financially strapped journalism efforts can convert to nonprofit status and diversify revenue sources.¹⁴⁸ Governments can suspend antitrust rules to allow news outlets to collectively bargain for better terms with tech platforms.¹⁴⁹ State and federal governments can use antitrust tools to prevent big entities from purchasing and essentially strip-mining local journalism.¹⁵⁰ Direct local, state, and national government support can offer tax credits and incentives for investment in subscriptions and other support for journalism.¹⁵¹

146. See *About Press Forward*, PRESS FORWARD, <https://www.pressforward.news/about/> [<https://perma.cc/2DEZ-HY6J>]; see Kristen Hare, *Press Forward Announces Goal to 'Raise the Next \$500 Million at the Local Level'*, POYNTER (Nov. 3, 2023), <https://www.poynter.org/business-work/2023/press-forward-local-chapters/> [<https://perma.cc/9SZ6-NHH5>]; Kristen Hare, *What Is Press Forward? Here Is Your Primer.*, POYNTER (Nov. 29, 2023), <https://www.poynter.org/business-work/2023/what-is-press-forward-journalism-funding/> [<https://perma.cc/2LF9-TLCV>].

147. See Robert Kuttner & Hildy Zenger, *Saving the Free Press from Private Equity*, AM. PROSPECT (Dec. 27, 2017), <https://prospect.org/health/saving-free-press-private-equity/> [<https://perma.cc/899G-LN5K>].

148. See *New INN Quick Guide Explores What It Means and What It Takes to Convert a For-Profit News Outlet to a Nonprofit Organization*, INST. FOR NONPROFIT NEWS (July 8, 2021), inn.org/news/new-inn-quick-guide-explores-what-it-means-and-what-it-takes-to-convert-a-for-profit-news-outlet-to-a-nonprofit-organization/ [<https://perma.cc/8LR8-FAVS>]; Eli Tan, *Local News Is Dying, but Not in San Francisco*, N.Y. TIMES (Aug. 31, 2024), <https://www.nytimes.com/2024/08/16/technology/san-francisco-local-news-resurgence.html> [<https://perma.cc/6MLL-48JN>].

149. See Press Release, Brad Sherman, Congressman, House of Representatives, Sherman Cosponsors Bill to Help Address Big Tech's Power Over News Organizations (Oct. 6, 2022), <https://sherman.house.gov/media-center/press-releases/sherman-cosponsors-bill-to-help-address-big-tech-s-power-over-news> [<https://perma.cc/5PAY-23VM>] (describing the Journalism Competition and Preservation Act which would enable journalism outlets to combine and negotiate for compensation from tech platforms). For a skeptical view, see Katharine Trendacosta & Danny O'Brien, *An Antitrust Exemption for News Media Won't Take Us Back to the Time Before Big Tech*, ELEC. FRONTIER FOUND. (Mar. 17, 2021), <https://www.eff.org/deeplinks/2021/03/antitrust-exemption-news-media-wont-take-us-back-time-big-tech> [<https://perma.cc/97PA-NWKP>].

150. See Steven Waldman, *How to Stop Vulture Funds from Killing Local News*, WASH. MONTHLY (Apr. 4, 2023), <https://washingtonmonthly.com/2023/04/04/how-to-stop-vulture-funds-from-killing-local-news/> [<https://perma.cc/958L-AEJ3>].

151. See Jessica Mahone, *An Overview of State and Local Legislation to Support Local*

State governments can make direct investments in journalism despite federal inaction, and “digital first” models can reduce production and distribution costs for journalism.¹⁵² Such measures are not only compatible with but also advance constitutional democracy by strengthening its preconditions.

President James Madison, a crucial Framer of the U.S. Constitution, once said, “a popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy.”¹⁵³ A farce or a tragedy is coming without fresh constitutional interpretations and inventive public and private policies.

III. GUARDING AGAINST LETHAL VIOLENCE

Farce or tragedy could describe the approach to lethal violence—notably intensified by the treatment of firearms—in the United States. A third crucial ingredient for a constitutional democracy is physical security and grounds for public confidence that social arrangements, including government, guarantee it. In contrast, the United States experiences the glorification of violence in media, including video games, which seems to match consumption patterns and desires of Americans in ways that differ from people in other nations.¹⁵⁴ The very public shooting of a health insurance executive

News: Policy Mechanisms and Challenges to Impact, 707 ANNALS AM. ACAD. POL. & SOC. SCI. 46, 46-52 (2023).

152. See Penelope Muse Abernathy, *How We End Local News Deserts*, POYNTER (Aug. 30, 2022), <https://www.poynter.org/business-work/2022/how-we-end-local-news-deserts/> [https://perma.cc/3HTZ-FKEK]; Buni, *supra* note 124; Rudi Keller, *New Owners Seek to Revive Missouri Newspapers Sold by Gannett*, MO. INDEP. (Oct. 11, 2021, at 10:00 ET), <https://missouriindependent.com/2021/10/11/new-owners-seek-to-revive-missouri-newspapers-sold-by-gannett/> [https://perma.cc/DJ3K-J95D].

153. Derek W. Black, *America's Founders Recognized the Need for Public Education. Democracy Requires Maintaining That Commitment*, TIME (Sep. 21, 2022), <https://time.com/5891261/early-american-education-history/> [https://perma.cc/6FPD-FF6P]. For a thorough research account, see BLACK, *supra* note 61, at 11-30. A Framer and then a President, James Madison also described how elite journalists such as Ben Franklin taught the public to converge around shared principles. See JEFFREY ROSEN, *THE PURSUIT OF HAPPINESS: HOW CLASSICAL WRITERS ON VIRTUE INSPIRED THE LIVES OF THE FOUNDERS AND DEFINED AMERICA* 195 (2024).

154. See Frank Summers, *The United States of America and the Glorification of Violence*, 36 PSYCHOANAL. INQ. 488, 488-90, 493-95 (2016); see Ken Brown, *Mental Health Expert Weighs in on 'Glorified Violence' After CEO Death*, FOX19 NOW (Dec. 11, 2024, at 16:23 ET),

in December 2024 elicited support for the shooter in expressing frustration with health insurance practices.¹⁵⁵ Some speculate gun violence in America is influenced by public policies—including the militarization of police departments, mass incarceration practices, military practices in foreign policy—and frontier mentality.¹⁵⁶

Whether you find that plausible or dubious, it is hard to deny that guns play a major role in the cultural attitudes and actual rates of lethal violence in the United States. Mass production and sale of multi-shot, revolving guns made lethal violence easy ever since the nineteenth century.¹⁵⁷ Currently, America has the weakest gun laws of any rich nation, along with the most guns—more than 393 million according to Aaron Karp, a political scientist who tracks global distribution of small arms.¹⁵⁸ Two other scholars state the situation

<https://www.fox19.com/2024/12/11/mental-health-expert-weighs-glorified-violence-after-ceo-death/> [<https://perma.cc/N6UF-2A58>] (communicating mental health expert's criticism of public support for alleged shooter of health insurance CEO); Clare Farmer & Richard William Evans, *Police Gun Violence Is Glorified on Screen. But More Armed and Aggressive Policing Doesn't Actually Make Us Safer*, CONVERSATION (Dec. 21, 2022, at 22:35 ET), <https://theconversation.com/police-gun-violence-is-glorified-on-screen-but-more-armed-and-aggressive-policing-doesnt-actually-make-us-safer-195920> [<https://perma.cc/Z6DX-KJRG>] (explaining that mass media glorifies aggressive policing yet armed and aggressive policing is associated with less safety).

155. See Desiree Adib & Ivan Pereira, *UnitedHealthcare CEO Shooting Opens Up 'Volcanic' Anger Toward Health Insurance Agencies*, ABC NEWS (Dec. 7, 2024, at 05:02 ET), <https://abcnews.go.com/US/unitedhealthcare-ceo-shooting-opens-volcanic-anger-health-insurance/story?id=116544385> [<https://perma.cc/M326-LJC2>]; Aja Romano & Sigal Samuel, *How to Think About the Public Backlash to the Killing of a Health Care CEO*, VOX (Dec. 7, 2024, at 06:30 ET), <https://www.vox.com/future-perfect/390223/united-healthcare-ceo-online-backlash-empathy> [<https://perma.cc/YX7F-RDW8>].

156. See C.J. Polychroniou, *Violence Is Deeply Rooted in American Culture: An Interview with Henry A. Giroux*, TRUTHOUT (Jan. 17, 2013), <https://truthout.org/articles/violence-is-deeply-rooted-in-american-culture-interview-with-henry-a-giroux/> [<https://perma.cc/4YVS-G8XV>]; Ayesha Venkataraman, *Why America Is More Violent than Other Democracies*, U.S. NEWS & WORLD REP. (Dec. 23, 2011), <https://www.usnews.com/opinion/articles/2011/12/23/why-america-is-more-violent-than-other-democracies> [<https://perma.cc/4WYX-2RHS>]; see generally PAUL AUSTER, *BLOODBATH NATION* (2023) (recounting personal and historical dimensions of gun violence in the United States, examining the nation's historical relationship with guns, and reflecting on treatment of mass shootings).

157. See Auster, *supra* note 156.

158. AARON KARP, SMALL ARMS SURV., ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS 4 (June 2018), <https://www.smallarmssurvey.org/sites/default/files/resources/SAS-SAS-BP-Civilian-Firearms-Numbers.pdf> [<https://perma.cc/CT7A-PNBF>]; see Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 10, 2022, at 09:00 ET), <https://www.cfr.org/background/us-gun-policy-global-comparisons> [<https://perma.cc/HV9G-BN4K>].

this way: Americans are twenty-five times more likely to be killed in a gun homicide than people in other high-income countries.¹⁵⁹ Homicides and suicides using guns keep rising.¹⁶⁰ Death by guns among American young people rose 50 percent between 2019 and 2021.¹⁶¹ Homicide is the leading cause of youth gun deaths; suicide accounted for about a third of the child and teen gun deaths during that time.¹⁶² The availability of guns is an undeniable factor in the increasing levels of gun deaths.¹⁶³ That is a distinguishing feature of the United States and so are the levels of gun violence when the United States is compared with other societies.¹⁶⁴

During 2024, eighty-three school shooting incidents took place in the United States.¹⁶⁵ Live shooter drills are familiar features of school calendars, even for preschoolers. After a shooter in 2018 killed seventeen students and staff in a Parkland, Florida school,

159. Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-Income Countries, 2015*, 123 *PREV. MED.* 20, 22 (2019). In addition, “nearly all Americans, of all racial/ethnic groups will know a victim of gun violence in their social network.” Bindu Kalesan, Janice Weinberg & Sandro Galea, *Gun Violence in Americans’ Social Network During Their Lifetime*, 93 *PREV. MED.* 53, 55 (2016). A disproportionate number of gun-related deaths affect African Americans, and “[u]narmed Black civilians are three times more likely to be shot and killed by police than unarmed white civilians.” *Gun Violence Statistics*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-violence-statistics/> [<https://perma.cc/DA8S-SBAA>].

160. For adults over fifty years old, the majority of gun deaths are suicides; for children, teens, and adults under thirty, the majority are homicides. *See Gun Violence Statistics*, *supra* note 159; John Gramlich, *Gun Deaths Among U.S. Children and Teens Rose 50% in Two Years*, PEW RSCH. CTR. (Apr. 6, 2023), <https://www.pewresearch.org/short-reads/2023/04/06/gun-deaths-among-us-kids-rose-50-percent-in-two-years/> [<https://perma.cc/GZS9-JPQB>].

161. Gramlich, *supra* note 160; Matt McGough, Krutika Amin, Nirmita Panchal & Cynthia Cox, *Child and Teen Firearm Mortality in the U.S. and Peer Countries*, KAISER FAM. FOUND. (July 18, 2023), <https://www.kff.org/mental-health/issue-brief/child-and-teen-firearm-mortality-in-the-u-s-and-peer-countries/> [<https://perma.cc/D3K5-DA5S>].

162. Gramlich, *supra* note 160.

163. *See* Mohsen Naghavi & The Global Burden of Disease 2016 Injury Collaborators, *Global Mortality from Firearms, 1990-2016*, 320 *JAMA* 792, 809 (2018); *see* JOHN SHATTUCK, SUSHMA RAMAN & MATHIAS RISSE, *HOLDING TOGETHER: THE HIJACKING OF RIGHTS IN AMERICA AND HOW TO RECLAIM THEM FOR EVERYONE* 219-20 (2022).

164. *See* Katherine Leach-Kemon, Rebecca Sirull & Scott Glenn, *On Gun Violence, the United States is an Outlier*, INST. FOR HEALTH METRICS & EVALUATION (Oct. 31, 2023), <https://www.healthdata.org/news-events/insights-blog/acting-data/gun-violence-united-states-outlier> [<https://perma.cc/2VKA-V66D>].

165. *See* Veera Korhonen, *Number of Shootings at K-12 Schools and College Campuses U.S. 2008-2025*, STATISTA, <https://www.statista.com/statistics/1462731/number-of-school-shootings-us/> [<https://perma.cc/KV3U-BC7J>].

students mobilized the “March for Our Lives.”¹⁶⁶ Over one million people marched and advocated for state and federal reforms.¹⁶⁷ Twenty-six states then adopted laws meant to reduce gun violence.¹⁶⁸ State law reforms have included higher minimum ages for gun purchases and longer waiting periods, but Congress enacted no federal laws in response to the movement.¹⁶⁹ Federal inaction persists despite strong majorities supporting gun regulations. At work is the lobbying and campaign contributions of gun lobbyists, led by the National Rifle Association, and asserted barriers to regulation due to recent judicial interpretations of the Second Amendment.¹⁷⁰

Partisan polarization in the United States contributes to federal inaction but only indirectly, because a majority of voters in both parties support gun control, including limits on what kinds of guns can be sold and to whom they can be sold.¹⁷¹ The overrepresentation of small states in the Senate and gerrymandering of electoral districts for the house—producing more extreme candidates—may be to blame. Despite 92 percent of Americans favoring background checks before any gun sale, Congress has not enacted such a requirement.¹⁷² For many years, Congress instituted a restriction on

166. See SHATTUCK ET AL., *supra* note 163, at 217.

167. German Lopez, *It's Official: March for Our Lives Was One of the Biggest Youth Protests Since the Vietnam War*, VOX (Mar. 26, 2018, at 10:10 ET), <https://www.vox.com/policy-and-politics/2018/3/26/17160646/march-for-our-lives-crowd-size-count> [<https://perma.cc/WV6V-ZYWZ>].

168. SHATTUCK ET AL., *supra* note 163, at 217-18. No plausible empirical case can be made that carrying a concealed weapon reduces crime. See Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193, 1285-89.

169. SHATTUCK ET AL., *supra* note 163, at 217-18.

170. *Id.* at 218. On campaign contributions, see *National Rifle Assn Profile: Recipients*, OPEN SECRETS, <https://www.opensecrets.org/orgs/national-rifle-assn/recipients?toprecipcycle=2024&id=d000000082&candcycle=2020> [<https://perma.cc/2KD8-BDYY>].

171. See SHATTUCK ET AL., *supra* note 163, at 218-19. These authors point to opinion polls in stressing room for political compromise given that 87 percent of Americans support limits on gun purchases by persons with mental illness and 81 percent support closing the “gunshow loophole,” allowing private sale of guns without background checks, as well as majorities supporting bans on assault-style weapons. *Id.*

172. Alexander Bolston, *Senate Republicans Block Assault Weapons Ban, Background Checks Bill*, HILL (Dec. 6, 2023, at 13:05 ET), <https://thehill.com/homenews/senate/4345455-senate-republicans-block-assault-weapons-ban/> [<https://perma.cc/E4HL-9PSQ>] (citing Megan Brennan, *Public Pressure for Gun Legislation Up After Shootings*, GALLUP: NEWS (June 23, 2022), <https://news.gallup.com/poll/394022/public-pressure-gun-legislation-shootings.aspx> [<https://perma.cc/9CDM-3KWA>]).

funding for studies of gun-related violence which itself reflected the power of the gun lobby.¹⁷³ Suspension of that restriction was the one federal congressional compromise after the mass shooting in Parkland, Florida.¹⁷⁴ In 2022, President Biden and Congress accomplished what many had tried for decades—they succeeded in expanding background checks by signing into law the Bipartisan Safer Communities Act.¹⁷⁵ This law broadened the category of gun sellers required to become licensed dealers and run background checks, though some serious loopholes remain.¹⁷⁶

What do gun violence and related reform debates have to do with constitutional democracy? Majorities in the country support gun control laws, but even successful efforts to pass laws restricting access to and use of extraordinarily lethal guns face largely successful judicial challenges.¹⁷⁷ The robust public desire for reasonable public safety restrictions on the sale and use of guns does not result in enforceable policies. In the United States, nearly 90 percent of those surveyed, expressed serious concerns about gun violence.¹⁷⁸ Most accidental gun deaths of children actually occur in their homes or homes of friends.¹⁷⁹ Physical safety and security matter in every

173. Allen Rostron, *The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection*, 108 AM. J. PUB. HEALTH 865, 865 (2018).

174. See *id.* at 866.

175. Nick Wilson, Chandler Hall & Allison Jordan, *The Bipartisan Safer Communities Act, 1 Year Later*, CTR. FOR AM. PROGRESS (Aug. 10, 2023), <https://www.americanprogress.org/article/the-bipartisan-safer-communities-act-1-year-later/> [<https://perma.cc/B2HY-Z59B>].

176. Implementation has not been easy. In 2023, President Biden signed an executive order to accelerate implementation of the Bipartisan Safer Communities Act, including by directing the Attorney General to move the United States as close to universal background checks as possible without additional legislation by clarifying the new Act. *Id.*; see Robert Leider, *The Bipartisan Safer Communities Act: Doctrinal and Policy Problems*, 49 J. LEGIS. 234, 249-50 (2023).

177. *Gun Control, Explained*, N.Y. TIMES (Jan. 26, 2023), <https://www.nytimes.com/explain/2023/gun-control> [<https://perma.cc/NC4R-8W9Y>]; Patrick Jonsson, *Americans Have a Right to Guns. How About to Public Peace?*, CHRISTIAN SCI. MONITOR (Nov. 3, 2023, at 17:44 ET), https://www.csmonitor.com/text_edition/USA/2023/1101/Americans-have-a-right-to-guns.-How-about-to-public-peace [<https://perma.cc/D2YQ-MHT9>]. On the gap between public support for reform and legal decisions, see SHATTUCK ET AL., *supra* note 163, at 218-19, 223-26.

178. *New Research: 88% of Americans Are Anxious About Gun Violence; Nearly Half of Gun Owners Report Carrying Their Weapons More as a Result*, EVOLV TECH. (Apr. 12, 2023), <https://www.evolvtechnology.com/resources/press-releases/new-research-88-of-americans-are-anxious-about-gun> [<https://perma.cc/U4KY-PWGL>].

179. Giri Viswanathan, *Most Accidental Shooting Deaths Among Children Involve Guns Left Loaded and Unlocked, Study Finds*, CNN (June 26, 2023, at 17:25 ET), <https://www.cnn.com/2023/06/26/health/children-accidental-shootings/index.html> [<https://perma.cc/VT3W->

society; so does confidence that today's children will grow to adulthood. Self-governance may be impossible in an environment of fear and doubt about the future.¹⁸⁰

Even when the majority desires gun safety rules, judicial interpretations of the Second Amendment reject reforms adopted by state and federal elected officials and chill further reforms. These interpretations—erecting an individual right to bear arms—are actually quite recent, supported by gun industry lobbyists and campaign contributors, and emerged from litigation campaigns by interest groups that succeeded in overturning longstanding judicial precedents departing from expert scholarship.¹⁸¹ The text itself is ambiguous because the Second Amendment locates the right to bear arms in conjunction with the need for a militia. It reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹⁸² To find an individual right to own and use guns in this language required some creative thinking and vigorous lobbying. The current judicial interpretation of the Second Amendment also ignores a scholarly debate over whether slavery influenced adoption of the Amendment, as some historians assert that an armed militia was needed to keep enslaved people from escaping,¹⁸³ though others disagree.¹⁸⁴

Not until 2008—217 years the after enactment of the Second Amendment—did five of the Justices announce, over a dissent by four other Justices, that the Second Amendment guarantees individuals the right to “bear arms,” and in that light, rejected a ban on handguns adopted within the District of Columbia.¹⁸⁵ Two years later, again in a five-to-four decision, the Court extended this decision to apply to state and local restrictions (thereby treating the

J2KV] (describing study published by the Center for Injury Research and Policy at Nationwide Children's Hospital in Ohio).

180. Thanks to Louie Goldsmith, Harvard Law School class of 2026, for this comment.

181. See Waldman, *supra* note 36.

182. U.S. CONST. amend. II.

183. See Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 321 (1998).

184. Paul Finkelman, *2nd Amendment Passed to Protect Slavery? No!*, ROOT (Jan. 21, 2013), <https://www.theroot.com/2nd-amendment-passed-to-protect-slavery-no-1790894965> [<https://perma.cc/T5WS-56AR>]; Stephen P. Halbrook, *The Second Amendment Was Adopted to Protect Liberty, Not Slavery: A Reply to Professors Bogus and Anderson*, 20 GEO. J.L. & PUB. POL'Y 575, 578-80 (2022).

185. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

newly recognized right as one incorporated through the Fourteenth Amendment).¹⁸⁶ Litigation challenging limits on individual ownership and possession of arms is now a growth industry. The trends cast grave suspicion about any state or federal regulations, as gun rights seems to foreclose reforms sought by majorities across the country.¹⁸⁷

Despite initial predictions that the “individual right” approach to the Second Amendment would not produce upheaval in settled law, the Court in 2022, by a vote of six to three, struck down a New York law limiting permission to carry a concealed gun to the discretion of local law enforcement personnel.¹⁸⁸ The majority, including three Justices appointed by President Trump, treated the right to carry a weapon as fundamental.¹⁸⁹ Justice Thomas’s opinion for the majority announced a constitutional presumption against gun restrictions, with exceptions solely when the government can “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”¹⁹⁰

The Court’s analysis in this case, *New York State Rifle & Pistol Ass’n v. Bruen*, cast doubt on laws restricting privately made “ghost guns,” on devices converting ordinary guns into machine guns, on gun bans applied to people subject to a domestic violence restraining order, and on restrictions of gun possession by people convicted of drug-related crimes.¹⁹¹ None of these neatly fit historic,

186. See *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

187. Perhaps this constitutional interpretation chills conversations as the House gag rule foreclosed antislavery discussions in the 1830s and 1840s. See *Struggles over Slavery: The “Gag” Rule*, NAT’L ARCHIVES, https://www.archives.gov/exhibits/treasures_of_congress/text/page10_text.html [<https://perma.cc/D2YU-UB5V>]. Thanks to Louie Goldsmith for this comparison.

188. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2122 (2022).

189. See *id.* at 2151.

190. See *id.* at 2130.

191. Chip Brownlee, *The Big Gun Cases Before SCOTUS*, TRACE (Jan. 17, 2024), <https://www.thetrace.org/2024/01/scotus-gun-rights-rahimi-nra-bump-stocks/> [<https://perma.cc/J6SJ-RPUD>] (discussing *United States v. Rahimi*, 144 S. Ct. 1889 (2024), *Garland v. Cargill*, 144 S. Ct. 1613 (2024), *United States v. Daniels*, 124 F.4th 967 (5th Cir. 2025), *petition for cert. filed*, 93 U.S.L.W. 3346 (U.S. June 5, 2025) (No. 24-1248), and other pending cases). On “ghost guns,” see Andrew Chung, *US Supreme Court Blocks Judge’s Order Allowing ‘Ghost Gun’ Sales*, REUTERS (Oct. 16, 2023, at 17:00 ET), <https://www.reuters.com/legal/us-supreme-court-blocks-judges-order-allowing-ghost-gun-sales-2023-10-16/> [<https://perma.cc/YAP7-597H>]. The Biden administration asked the Supreme Court to review the matter. Nate Raymond, *Biden Administration Asks US Supreme Court to Hear ‘Ghost*

longstanding restrictions which now appear to be the criterion imposed under the Second Amendment. As judges try to implement the *Bruen* inquiry into “history and tradition,” how should they address unprecedented technologies and at what level of generality? “Ghost guns,” made without serial numbers, are now easily producible because of the arrival and prevalence of 3D printing.¹⁹²

Neither 3D printing nor domestic violence restraining orders existed at the time of the Second Amendment’s adoption.¹⁹³ This fact influenced the federal court of appeals that struck down the legal restriction.¹⁹⁴ When Congress enacted a restriction on gun possession by someone subject to a domestic violence restraining order, it looked not to the past but instead to contemporary research showing that armed domestic abusers pose a significant risk to intimate partners, law enforcement, and others.¹⁹⁵ Such considerations fall outside the inquiry specified by the Supreme Court in challenges to restrictions on guns.¹⁹⁶

The Supreme Court underscored and compounded confusion in its 2024 treatment of a federal law banning gun ownership by individuals subject to certain domestic violence restraining orders.¹⁹⁷ Eight

Gun’ Appeal, REUTERS (Feb. 7, 2024, at 16:45 ET), <https://www.reuters.com/world/us/biden-administration-asks-us-supreme-court-hear-ghost-gun-appeal-2024-02-07/> [https://perma.cc/NXF7-KHYT]. Law enforcement recovered more than 19,000 suspected ghost guns in 2021 during criminal investigations, which represented a 1,000 percent increase from 2017. *Id.*

192. Police recently found ghost guns and the 3D printers used to make them at a day care facility in East Harlem—all beyond the imagination of those who drafted the Second Amendment. See Doug Williams & Ali Bauman, *Police: Ghost Guns and 3D Printers for Making Them Found at New York City Day Care*, CBS NEWS (Sep. 27, 2023, at 23:38 ET), <https://www.cbsnews.com/newyork/news/police-ghost-guns-and-3d-printers-for-making-them-found-at-harlem-day-care/> [https://perma.cc/5WY3-87FH].

193. Kelly Roskam, *Questions and Answers on U.S. v. Rahimi, the Major Gun Case Before the Supreme Court During Its 2023-2024 Term*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Oct. 10, 2023), https://publichealth.jhu.edu/center-for-gun-violence-solutions/2023/questions-and-answers-on-us-v-rahimi-the-major-gun-case-before-the-supreme-court-during-its-2023-2024-term [https://perma.cc/LL4A-LZC4].

194. See *United States v. Rahimi*, 61 F.4th 443, 452 (5th Cir. 2023), *rev’d*, 144 S. Ct. 1889 (2024).

195. See 139 Cong. Rec. 28360 (1993) (statement of Sen. Paul Wellstone) (citing statistics on the use of weapons in incidents of domestic violence to explain support for that law at issue in *Rahimi*).

196. See *Rahimi*, 61 F.4th at 452.

197. *United States v. Rahimi*, 144 S. Ct. 1889, 1896-97 (2024) (upholding 18 U.S.C. § 922(g)(8) despite Second Amendment challenge).

of the nine Justices upheld that law in *United States v. Rahimi*, but the matter generated seven opinions, six endorsing for the result and one (Justice Thomas, author of the prior *Bruen* decision) in dissent. Its seven opinions exposed continuing disagreement among the Justices over the meaning and scope of the Court's newly announced "history and tradition" test.¹⁹⁸ Indeed, there appears to be some "buyers' remorse" by the five others who signed onto Justice Thomas's opinion in *Bruen*.¹⁹⁹

The Justices differed over whether principles inferred from past regulations can satisfy what "history and tradition" allow instead of demanding a matching regulation from the past; they also differed over what time period and sources were relevant for discerning past traditions, and whether evolving societal needs can be taken into account.²⁰⁰ Justice Jackson's concurring opinion pointed to examples of conflicting opinions emerging as courts try to apply the *Bruen* test and marked stark contrast with the nearly universal accord in the courts prior to *Bruen*.²⁰¹ One retired judge from Texas, originally appointed by President George W. Bush, objected that judges "are not experts in what white, wealthy, and male property owners thought about firearms regulation in 1791."²⁰² The Supreme Court's

198. Because the case posed a "facial challenge" to the federal law, the challenger had to establish that "no set of circumstances exists under which the Act would be valid." *Id.* at 1898, 1902 (quoting *United States v. Salerno*, 841 U.S. 739, 745 (1987)).

199. Many of the Justices expressed strong skepticism about the arguments offered to the Court on behalf of defendant Zachary Rahimi. See Amy Howe, *Justices Appear Wary of Striking Down Domestic-Violence Gun Restriction*, SCOTUSBLOG (Nov. 7, 2023, at 17:47 ET), <https://www.scotusblog.com/2023/11/justices-appear-wary-of-striking-down-domestic-violence-gun-restriction/> [<https://perma.cc/3E24-3MPP>]. Rahimi had not only shoved his then-girlfriend and mother of their child; he shoved the victim and caused her head to strike the car dashboard and shot his gun either to threaten the victim or to threaten a witness to the incident. *Rahimi*, 144 S. Ct. at 1894-95. Further, Rahimi did not contest the testimony she gave with her request for a restraining order that he had previously threatened another woman with a gun giving rise to a charge for aggravated assault with a deadly weapon and was identified as a suspect in at least five additional shootings. *Id.* at 1894-95.

200. Compare *Rahimi*, 144 S. Ct. at 1902-03, with *id.* at 1904-05 (Sotomayor, J., concurring) and *id.* at 1907 (Gorsuch, J., concurring) and *id.* at 1923 (Kavanaugh, J., concurring) and *id.* at 1924-25 (Barrett, J., concurring), and *id.* at 1926 (Jackson, J., concurring), and *id.* at 1931-32 (Thomas, J., dissenting).

201. See *id.* at 1927 (Jackson, J., concurring) (citing Brief for Second Amendment Law Scholars as Amici Curiae).

202. Rachel Weiner, *The Supreme Court Upended Gun Laws Nationwide. Mass Confusion Has Followed.*, WASH. POST (July 7, 2024), <https://www.washingtonpost.com/dc-md-vi/2024/07/07/gun-laws-supreme-court-bruen-rahimi/> [<https://perma.cc/RXV7-M3DF>]. Professor

opinions contribute to serious questions about the constitutional system, producing judicial confusion, instability for the public, and potential paralysis for lawmakers.²⁰³ Only a minority of the Court thought it relevant to consider evidence showing the heightened dangers that armed domestic violence offenders pose to their families, law enforcement, and their communities.²⁰⁴

The repercussions of the Court's Second Amendment decisions reverberate and dislodge seemingly settled laws. The high court of Massachusetts recently relied on the Supreme Court's cases to strike down a sixty-seven-year-old ban on switchblades.²⁰⁵ A federal

Nelson Lund commented: "It's not good to have a legal test that doesn't work; it just invites courts to apply the test dishonestly." *Id.*

203. Can localities restrict assault weapons or semi-automatic rifles? *See* Jacob Sullum, *A Federal Judge Reluctantly Concludes That New Jersey's AR-15 Ban Is Unconstitutional*, REASON (Aug. 1, 2024, at 15:55 ET), <https://reason.com/2024/08/01/a-federal-judge-reluctantly-concludes-that-new-jerseys-ar-15-ban-is-unconstitutional/> [<https://perma.cc/MN28-MNFK>]; Mike Catalini, *Federal Judge Says New Jersey's Ban on AR-15 Rifles Is Unconstitutional*, AP NEWS (July 31, 2024, at 18:49 ET), <https://apnews.com/article/new-jersey-assault-rifle-ban-bcc4eddd3e2b216f6a9faad6c273be09> [<https://perma.cc/3ZLR-2E6X>]; Noah Feldman, *Opinion, AR-15s Are Weapons of War. A Federal Judge Just Confirmed It.*, BLOOMBERG: OP. (Aug. 11, 2024, at 08:00 ET), <https://www.bloomberg.com/opinion/articles/2024-08-11/ar-15s-are-weapons-of-war-a-federal-judge-just-confirmed-it?srnd=undefined> [<https://perma.cc/Y3LB-BAWB>]; Andrew Chung, *US Supreme Court Rebuffs Appeal Over Maryland Assault Weapons Ban*, REUTERS (May 20, 2024, at 10:37 ET), <https://www.reuters.com/world/us/us-supreme-court-rebuffs-appeal-maryland-assault-weapon-dispute-2024-05-20/> [<https://perma.cc/L77M-L7BV>]. *See* *Bianchi v. Brown*, 111 F.4th 438 (4th Cir. 2024) (en banc), *cert. denied*, 145 S. Ct. 1534 (2025), for Judge Wilkinson's opinion for the en banc court upholding Maryland's ban of AR-15 semi-automatic assault weapons. The AR-15 was the gun used to assault Donald Trump. Michael Gold, Julian E. Barnes & Simon J. Levien, *Trump Is Safe After Assassination Attempt; Suspected Gunman Is Dead*, N.Y. TIMES (Dec. 5, 2024), <https://www.nytimes.com/live/2024/07/13/us/biden-trump-election> [<https://perma.cc/5KVS-4VZ2>]. The same gun was used in 2024 by the fourteen-year-old who killed four and wounded nine others in a school. Allison Elyse Gualtieri, Grace Manthey, Sarah Metz, Rachel Gold & Cara Tabachnik, *Where the Suspected Georgia School Shooter Got the Gun, and More Questions Answered*, CBS NEWS (Sep. 6, 2024, at 13:29 ET), <https://www.cbsnews.com/news/georgia-school-shooting-gun/> [<https://perma.cc/Z4B8-YR3S>].

204. *See Rahimi*, 144 S. Ct. at 1906 (Sotomayor, J., concurring).

205. Kathy McCormack & David Sharp, *Mass. High Court Strikes Down 67-Year-Old Switchblade Ban, Citing Supreme Court Gun Decision*, WBUR NEWS (Aug. 28, 2024), <https://www.wbur.org/news/2024/08/28/mass-high-court-strikes-down-67-year-old-switchblade-ban-citing-supreme-court-gun-decision> [<https://perma.cc/D9TE-7HGW>]. The Massachusetts decision, *Commonwealth v. Canjura*, found a knife with an automatic spring release for the blade protected by the Second Amendment and reviewed contrasting interpretations of the Supreme Court's precedents, with some courts treating as a single inquiry whether the weapon in question is in "common use" and whether it is "dangerous and unusual," while other courts treat the two inquiries as distinct. 240 N.E.3d 213, 220 (Mass. 2024).

judge in California reversed his previous ruling and struck down a one-hundred-year-old state ban on billy club weapons.²⁰⁶ The Court of Appeals of North Carolina rejected the application of a long-standing law prohibiting possession of a firearm on educational property.²⁰⁷

Some places are so sensitive that they deserve protection from the presence of guns, but which places count?²⁰⁸ The Supreme Court Justices seem certain that their own courthouse is one of those places.²⁰⁹ What about schools, houses of worship, sports gatherings, and neighborhoods where gun violence has been much higher than elsewhere? Perhaps like people communing over a Ouija board,²¹⁰ the judiciary seems to huddle over the mystery of Second Amendment interpretation while declining responsibility for decisions about what measures government can take amid the epidemic of gun deaths.²¹¹

206. On the billy club ruling, see Kevin Rector, *Billy Clubs? Butterfly Knives? Legal Shift on 2nd Amendment Affects More than Just Guns*, L.A. TIMES (Feb. 28, 2024, at 12:29 ET), <https://www.latimes.com/california/story/2024-02-28/billy-clubs-butterfly-knives-legal-shift-on-2nd-amendment-affects-more-than-just-guns> [https://perma.cc/84WR-SR5F].

207. *State v. Radomski*, 901 S.E.2d 908, 919 (N.C. Ct. App. 2024) (finding that firearm kept within defendant's vehicle at a parking lot was consistent with the nation's historical traditions of firearm regulation). Some states have upheld firearm regulations even after *Bruen*. See, e.g., *R.M. v. C.M.*, 207 N.Y.S.3d 634 (N.Y. App. Div. 2024) (upholding temporary restrictions on individuals deemed a threat to self or others in light of historical traditions of disarming individuals who pose a danger to public safety); *Parker v. State*, 392 So. 3d 214, 215 (Fla. Dist. Ct. App. 2024) (upholding prohibition on felons possessing firearms in public in light of historical analogues); *Edenfield v. State*, 375 So. 3d 930, 932 (Fla. Dist. Ct. App. 2023) (upholding restriction of firearms for individuals convicted of serious crimes in light of historical traditions); *Wade v. Univ. of Mich.*, 16 N.W.3d 543, 620 (Mich. Ct. App. 2023) (upholding restriction on firearms on campus in light of historical approach to sensitive places); *Caulkins v. Prtizker*, 228 N.E.3d 181, 197-98 (Ill. 2023) (upholding ban on assault weapons and large-capacity magazines).

208. See Jacob Sullum, *9th Circuit Temporarily Restores the Right to Bear Arms as It Mulls California's New Gun-Free Zones*, REASON (Jan. 8, 2024, at 12:50 ET), <https://reason.com/2024/01/08/9th-circuit-temporarily-restores-the-right-to-bear-arms-as-it-mulls-californias-new-gun-free-zones/> [https://perma.cc/VXJ7-6JGF].

209. *Visiting the Court: Entering the Building and Prohibited Items*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/visiting/prohibited-items.aspx> [https://perma.cc/RBF9-HSBM] (explaining prohibited items include “[g]uns, replica guns, electric stun guns, ammunition, martial arts weapons or devices, and fireworks”).

210. See Linda Rodriguez McRobbie & Ellen Wexler, *The Ouija Board Can't Connect Us to Paranormal Forces—but It Can Tell Us a Lot About Psychology, Grief and Uncertainty*, SMITHSONIAN MAG. (Oct. 30, 2024), <https://www.smithsonianmag.com/history/the-strange-and-mysterious-history-of-the-ouija-board-5860627/> [https://perma.cc/9YM3-G2ZF].

211. The Biden administration tried to regulate ghost guns but faced a challenge alleging

Confusion over the interpretation of the Second Amendment also invites tensions between the federal and state governments. The Hawaii Supreme Court disagreed with the federal Supreme Court in what one observer described as “open rebellion” against the right to armed self-defense.²¹² Missouri tried to disregard federal gun control laws, but the Supreme Court sided with the federal government’s laws.²¹³ The dynamic could well change with a new set of federal lawyers involved.

Public opinion polls continue to indicate strong support for reforms framed in terms of responsibilities and security, not just rights, and for gun safety and restrictions applied to particular individuals such as persons with mental illness, people under the age of twenty-one, and people subject to domestic violence orders.²¹⁴ The distance between majority views and adopted policies persists in many areas, with gun regulation serving as just one prominent example.²¹⁵ That gap, coupled with crises of daily security,

such efforts exceed statutory authority. See Nate Raymond, *US Appeals Court Calls Biden’s ‘Ghost Gun’ Limits Unlawful*, REUTERS (Nov. 9, 2023, at 21:23 ET), <https://www.reuters.com/legal/us-appeals-court-calls-bidens-ghost-gun-limits-unlawful-2023-11-10> [<https://perma.cc/E8R4-C556>]. The Supreme Court temporarily halted that judgment, pending further review. Amy Howe, *Justices Again Side with Biden on Ghost Guns*, SCOTUSBLOG (Oct. 16, 2023, at 18:00 ET), <https://www.scotusblog.com/2023/10/justices-again-side-with-biden-on-ghost-guns/> [<https://perma.cc/J2B6-A6PL>]. Further, in 2024, the Supreme Court concluded that “bump stocks” (used to increase the firing rate of a semiautomatic firearm to approximate the rates of a machine gun) fall outside the scope of a federal law regulating machine guns, short-barreled rifles, and shotguns, and beyond discretion granted to the enforcing agency. *Garland v. Cargill*, 602 U.S. 406, 410, 427 (2024).

212. Jacob Sullum, *Hawaii’s Supreme Court Insists There Is No Individual Right to Arms*, REASON (Feb. 8, 2024, at 15:45 ET), <https://reason.com/2024/02/08/hawaiis-supreme-court-insists-there-is-no-individual-right-to-arms> [<https://perma.cc/KYS8-8K6K>].

213. John Kruzel, *US Supreme Court Won’t Revive Law Targeting Federal Gun Curbs*, REUTERS (Oct. 20, 2023, at 19:52 UTC), <https://www.reuters.com/legal/government/us-supreme-court-wont-revive-law-targeting-federal-gun-curbs-2023-10-20/> [<https://perma.cc/45UC-PR4F>]. Missouri had enacted a law seeking to disregard federal tax laws related to firearm sales and regulations restricting gun possession by people convicted of certain felonies, convicted of domestic violence misdemeanors, and dishonorably discharged from the military. *Id.*

214. SHATTUCK ET AL., *supra* note 163, at 232-35.

215. At least half of Americans see gun violence as a major and pressing problem, calling for governmental restrictions on ownership of guns or ammunition. PEW RSCH. CTR., *GUN VIOLENCE WIDELY VIEWED AS A MAJOR—AND GROWING—NATIONAL PROBLEM* 5-6 (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/06/PP_2023.06.28_gun-violence_REPORT.pdf [<https://perma.cc/P9C8-4X38>]. Other proposals supported by nationwide majorities include strengthening voting rights, rights for immigrants, and addressing

illustrates a real danger to people's confidence in the government and in society.²¹⁶ The gap emerges from structural elements set up by the U.S. Constitution and by accidents of history.²¹⁷ Putting together the effects of the Electoral College and the Senate structure, a President who did not secure the popular vote can select judges and Justices who in turn can be confirmed by senators who represent a minority of voters even when the judicial nominations are opposed by senators who represent the majority.²¹⁸ A constitutional democracy could create balance between federal and state power to help the expression of contrasting positions, to find a path between stability and change, and to guard against fraud in elections without creating insuperable obstacles to translating popular views into governmental policy.²¹⁹ These approaches do not

defects of social media and the circulation of misinformation. *See, e.g.*, SHATTUCK ET AL., *supra* note 163, at 5-7, 207-11, 258-59.

216. *See* Lee Rainie & Andrew Perrin, *Key Findings About Americans' Declining Trust in Government and Each Other*, PEW RSCH. CTR. (July 22, 2019), <https://www.pewresearch.org/short-reads/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/> [<https://perma.cc/2D7A-X6LA>].

217. *See* Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 61-62 (2022).

218. *See* Douglas J. Amy, *Two Senators per State: A Recipe for Minority Domination*, SECOND-RATE DEMOCRACY, <https://secondratedemocracy.com/unrepresentative-senate/> [<https://perma.cc/Q34P-84P7>] ("When President Trump's nominee, Neil Gorsuch, was approved by the Senate in 2017, the 45 Democratic Senators who opposed him actually represented 25 million more Americans than the 55 Republican Senators who supported him. This happened again with Trump's second nominee, Brett Kavanaugh, who was approved by Senators who represented only 45% of the American public. And the same thing occurred with Trump's appointment of Amy Coney Barrett—who was approved by Republican Senators who represented 14 million fewer Americans than the Senate Democrats who opposed her." (emphasis omitted)). Further, "in 2016, the Senate Republicans who blocked President Obama's nominee to the Court, Merrick Garland, represented 20 million fewer people than the Democrats who supported him." *Id.* (emphasis omitted).

219. For discussions of structural barriers to democratic processes within the United States' constitutional design and practice, *see* Gould & Pozen, *supra* note 217, at 70, 82; Danyelle Solomon, Connor Maxwell & Abril Castro, *Systematic Inequality and American Democracy*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), <https://www.americanprogress.org/article/systematic-inequality-american-democracy/> [<https://perma.cc/B8XR-UXUN>]. Among potential reforms consistent with the U.S. Constitution is the National Popular Vote compact; designed to take effect when enacted by enough states to produce a majority (270) of the electoral votes (538), the law would direct that "the presidential candidate receiving the most popular votes in all 50 states and DC will get all the electoral votes from all of the enacting states. That is, the candidate receiving the most popular votes nationwide will be guaranteed enough electoral votes to become President." NAT'L POPULAR VOTE, AGREEMENT AMONG THE STATES TO ELECT THE PRESIDENT BY NATIONAL POPULAR VOTE (2024), <https://www.national>

characterize the current combination of constitutional structure and particular judicial decisions in the United States.²²⁰

A government's unresponsiveness to majority views on just one issue does not necessarily undermine people's perceptions of legitimacy across the board. But persistent distance from what people want and what the government delivers can generate distrust and, for some, make authoritarian regimes look more attractive.²²¹ In the contemporary United States, the distance between popular desires seems to grow not only with regard to gun safety but other policies as well.²²² The jeopardy to security arises, then, not only in the specific context of guns, but in the risk of disrespect and disobedience toward the government and the social order it represents.²²³ Declining public confidence in governmental processes raises the risk of politically motivated violence.²²⁴ In addition, disaffection and cynicism undermine participation critical to democratic governance.²²⁵

popularvote.com/sites/default/files/202404/1-pager-npv-v235-2024-4-15.pdf [https://perma.cc/5C7E-84PG]. On this and other democracy reforms for the United States, see Ian Millhiser, *11 Ways to Fix America's Fundamentally Broken Democracy*, VOX (Sep. 14, 2020, at 12:00 UTC), <https://www.vox.com/21336225/voting-rights-senate-electoral-college-gerry-mandering-supreme-court> [https://perma.cc/3D6Z-EV7D].

220. See Gould & Pozen, *supra* note 217, at 63, 69, 136.

221. See MERYL MINER & SCOTT WARREN, UNDERSTANDING YOUTH PERCEPTIONS TOWARDS AUTHORITARIANISM 4 (2024), https://snfagora.jhu.edu/wp-content/uploads/2024/06/SNFRReportDesign2YA_r655.pdf [https://perma.cc/U4MH-9JVV]; see also NADINE SMITH, CTR. FOR PUB. IMPACT, WHAT DRIVES LEGITIMACY IN GOVERNMENT? 15-17 (2024), <https://www.centreforpublicimpact.org/wp-content/uploads/2024/10/What-drives-legitimacy-in-government1.pdf> [https://perma.cc/B3JB-LFVH] (describing how a government's legitimacy can erode if it does not uphold its side of the social contract).

222. See SHATTUCK ET AL., *supra* note 163, at 86-87.

223. See SMITH, *supra* note 221, at 4-7.

224. Imran Arif & Nabamita Dutta, *Legitimacy of Government and Governance*, 2024 J. INST. ECON. 1, 2, 4 (2024), <https://www.cambridge.org/core/journals/journal-of-institutional-economics/article/legitimacy-of-government-and-governance/FDADFEB09B4277A9D0FEF27115FBE3AA> [https://perma.cc/5GX4-8RKV]. On growing political violence and expectation of more in the United States, see Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY, Oct. 2021, at 160, 161; Adrienne LaFrance, *American Fury*, ATLANTIC (July 23, 2024), <https://www.theatlantic.com/magazine/archive/2024/09/trump-butler-assassination-attempt-pa-rally/679153/> [https://perma.cc/MF2W-ET44].

225. Attentiveness to the relationship between day-to-day security and democracy is explicit in efforts to address international conflicts and risks of authoritarianism and corruption abroad. Rachel Kleinfeld, *Why Supporters of Democracy and Security Both Need to Care About Security Sector Governance*, JUST SEC. (June 4, 2021), <https://www.justsecurity.org/76768/why-supporters-of-democracy-and-security-both-need-to-care-about->

After studying young people living in inner cities in the United States, Professor Monica Bell described “catastrophic violence,” including gun violence and economic violence; she observed that “safety is a positive precondition for individual and collective freedom, perhaps especially for those to whom it has been long denied.”²²⁶ Judge J. Harvie Wilkinson recently put the point powerfully in his opinion for the Fourth Circuit, sitting en banc as it upheld Maryland’s ban on assault weapons.²²⁷ That opinion observed that assault weapons “are not our forebears’ arms, and these are not our forebears’ calamities.”²²⁸ Further, his opinion for the court reasoned that decades of legislated regulations demonstrated that the Second Amendment “has not disabled the ability of representative democracy to respond to an urgent public safety crisis. To disregard this tradition today—when mass slaughters multiply and the innovation of weaponry proceeds apace—could imperil both the perception and reality of well-being in our nation.”²²⁹

Courts have important roles to play in preserving respect for constitutional text and continuity with history while also remaining mindful of the effects of judicial actions in the present and the future.²³⁰ A constitutional democracy is meant to serve a nation’s

security-sector-governance/ [https://perma.cc/5FK9-V82K]; see also Emily Cole & Calin Trenkov-Wermuth, *To Consolidate Democracy, Change U.S. Security Assistance*, U.S. INST. PEACE (Dec. 16, 2021), <https://www.usip.org/publications/2021/12/consolidate-democracy-change-us-security-assistance> [https://perma.cc/FZ8N-Z97G] (arguing that the United States should focus on promoting democratic values abroad).

226. Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 714, 720 (2019); see *id.* at 721 (discussing the reports produced by the Ferguson Commission in 2015 and the Vision for Black Lives platform, conceiving safety “as a value, moving away from criminal-justice centered conceptions and showing how those conceptions can be antithetical to community safety”).

227. See *Bianchi v. Brown*, 111 F.4th 438, 441-42 (4th Cir. 2024) (en banc), *cert. denied*, 145 S. Ct. 1534 (2025).

228. *Id.* at 464.

229. *Id.* at 472.

230. See Tom R. Tyler, *Evaluating Consensual Models of Governance*, 61 POL. LEGITIMACY 257, 259-60 (2019) (arguing that, to be effective, a government based on consent and legitimacy calls for a framework for people to accept their responsibility to defer to authority while evaluating legal or political authorities in terms of the fairness of their decisions, respect for individuals and their rights, and acknowledgment of the boundary conditions for their authority). In his concurring opinion upholding the Maryland ban on assault weapons, Chief Judge Diaz observed, “The ‘history-only’ view of my dissenting colleagues, while cleaving to all of *Bruen*’s strictures and none of its oxygen, would dismiss these public safety

people.²³¹ In the specific context of the regulation of firearms, courts in a constitutional democracy can protect those who associate gun ownership and possession with security without suppressing sensible efforts to prevent and control gun-related suicides, mass shootings, and escalation of interpersonal and political conflict into lethal violence.²³² A judicial process that obstructs sensible, demonstrably effective safety laws governing guns not only puts communities in jeopardy, it also endangers the viability of a constitutional democracy.²³³

The risk of lethal violence and the contested treatment of gun issues are tied to broader dilemmas that courts alone cannot resolve. In the United States, race-related fears and actions are intertwined with patterns of gun-related violence.²³⁴ Racial disparities characterize police responses in the United States.²³⁵ Gun-related deaths for white Americans significantly involve suicide while for Black Americans, homicides vastly outnumber suicides involving guns.²³⁶ Fear held by some white Americans of being “replaced” by racial minorities seems to be connected with two recent mass-shooting incidents.²³⁷ Compared with gun owners who

concerns of today as untethered to the discernible legislative footprints of 250 years ago,” and he concluded, “History should guide. The Constitution should anchor. But neither should drown us.” *Bianchi*, 111 F.4th at 475-76 (Diaz, C.J., concurring).

231. The alignment with “the right of the people” within a democracy is present even in the language of the Second Amendment. U.S. CONST. amend. II; see Waldman, *supra* note 36.

232. See SHATTUCK ET AL., *supra* note 163, at 217-36.

233. See *id.*

234. Richard V. Reeves & Sarah E. Holmes, *Guns and Race: The Different Worlds of Black and White Americans*, BROOKINGS INST.: COMMENTARY (Dec. 15, 2015), <https://www.brookings.edu/articles/guns-and-race-the-different-worlds-of-black-and-white-americans/> [<https://perma.cc/Q2GA-6P24>].

235. See *Study of Fatal and Nonfatal Shootings by Police Reveals Racial Disparities, Dispatch Risks*, BLOOMBERG SCH. PUB. HEALTH (Mar. 15, 2024), <https://publichealth.jhu.edu/2024/study-of-fatal-and-nonfatal-shootings-by-police-reveals-racial-disparities-dispatch-risks> [<https://perma.cc/ET8L-S5MA>]; Julie A. Ward, Mudia Uzzi, Talib Hudson, Daniel W. Webster & Cassandra K. Crifasi, *Differences in Perceptions of Gun-Related Safety by Race and Gun Ownership in the United States*, 51 J.L. MED. & ETHICS 14, 15 (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10209993/pdf/S1073110523000384a.pdf> [<https://perma.cc/B2ZC-DN2S>] (“Research suggests that gun acquisition, though often motivated by personal safety interests, frequently leads to incomplete resolution of safety-related concerns.”).

236. Reeves & Holmes, *supra* note 234.

237. Clyde W. Ford, *History Shows Racial Violence Born out of Fear of Being Replaced*, SEATTLE TIMES (May 27, 2022, at 13:25 ET), <https://www.seattletimes.com/opinion/history-shows-racial-violence-born-out-of-fear-of-being-replaced/> [<https://perma.cc/BHX3-ZRTW>].

are white, Black and Hispanic gun owners report a much lower sense of safety if more people could legally carry guns.²³⁸

Fears and distrust of others underlie the ideas of a social contract and a democratic constitution; people surrender a portion of their liberty in order to establish governments offering protection and enforcement of rights. Yet fear and distrust of others—sometimes triggered by terrifying incidents and sometimes by alarmist media—can undermine the project of peaceful coexistence and self-government.²³⁹ Self-defense, not hunting, has become the primary reason offered by Americans who buy guns; that itself exposes the high level of interpersonal and intergroup fear jeopardizing security.²⁴⁰ Rising levels of distrust of other people and of government indicate serious obstacles for solving problems and for a constitutional democracy.²⁴¹ Building bases for trust and replenishing lost trust may be pivotal to the security that a constitutional democracy is meant to provide. Creating and replenishing the conditions for security should be part and parcel of the project of a constitutional democracy.²⁴² Reforms matter not only for the lives that could be saved but also for the legitimacy and effectiveness of self-government in the United States. Rather than aligning inputs and outputs into virtual circles of freedom and equality, our governmental system prevents the basic investments in ensuring its survival.

CONCLUSION

While this Article's discussion concludes here, the issues remain. No society is born a constitutional democracy. In ancient Greece and Rome, and in the United States for most of its first century, an

238. Ward et al., *supra* note 235, at 21.

239. For a discussion of this risk in the context of rising social distrust in Australia and the United States, see Laura D'Olimpio, *Fear, Trust, and the Social Contract: What's Lost in a Society on Permanent Alert*, ABC AUSTL. (Oct. 25, 2016), <https://www.abc.net.au/news/2016-10-26/fear-trust-social-contract-society-on-permanent-alert/7959304> [<https://perma.cc/5E9Z-T6X7>].

240. SHATTUCK ET AL., *supra* note 163, at 220.

241. Rainie & Perrin, *supra* note 216.

242. Michelle Wilde Anderson's vivid study of American cities notes, "The idea that cities and counties should focus on shaping comfort, safety, and opportunity for their people should not sound radical. It sounds like democracy (governments should serve constituents), or even like family (take them as they are and go from there)." MICHELLE WILDE ANDERSON, *THE FIGHT TO SAVE THE TOWN: REIMAGINING DISCARDED AMERICA* 243 (2022).

anti-democratic caste system prevailed.²⁴³ Even those nations committed to constitutional democracy must continually work on realizing those ideals. Democracies around the world face severe challenges, and the United States is far from immune. Indeed, as I have suggested, some of the ingredients necessary for the system to work are not only missing but are blocked by features of the system, whether by design or by happenstance.²⁴⁴

There are potential intersections between the three preconditions I have discussed.²⁴⁵ The lack of safety from gun violence has a specific impact on schools and education, creating an unsafe and oftentimes traumatic learning environment for schoolchildren, from active shooter drills—not to mention actual lethal violence in schools.²⁴⁶ Violent threats against journalists and restrictions on teaching civics in schools reflect some of the same dynamics of political polarization animating the legislative and judicial conflicts over regulating arms.²⁴⁷

Beyond the three I have addressed, anyone who cares about a viable democracy should spend more time on furthering basic predicates including: (1) acceptance of elections and sufficient reciprocity for peaceful transitions following elections; (2) peaceful co-existence and inclusive political deliberations among people with different affiliations and views; (3) adequate capacity and stability for families and other groups to provide care for children and the elderly; (4) freedom to form and maintain private associations, religions, and organizations; (5) a genuine promise to eliminate permanent castes and support a sense of “we” who share the polity and the opportunities of self-governance; and (6) effective vigilance against the forces that would prevent self-governance and rights for all.²⁴⁸ Sufficient grounds to believe that the political and economic systems are not

243. See PAUL CARTLEDGE, *DEMOCRACY: A LIFE* xvii, 33, 102, 226, 259-60 (2016).

244. See Gould & Pozen, *supra* note 217, at 62.

245. Thanks to Derek Wang for raising the interconnections.

246. See SHATTUCK ET AL., *supra* note 163, at 217.

247. See Rasmus Kleis Nielsen, *The Worst Threats to Journalism Come from Politicians. The Best Defence Against Them Is Serving the Public*, REUTERS INST. (Sep. 28, 2024), <https://reutersinstitute.politics.ox.ac.uk/news/worst-threats-journalism-come-politicians-best-defence-against-them-serving-public> [<https://perma.cc/J22Q-67AX>]; see also Sacha M. Coupet, *Valuing All Identities Beyond the Schoolhouse Gate: The Case for Inclusivity as a Civic Virtue in K-12*, 27 MICH. J. GENDER & L. 1, 80 (2020) (discussing how parents have attempted to assert greater curricular control in schools, limiting civics education).

248. See *supra* notes 25-31 and accompanying text.

so rigged as to prevent lawful change may be a thread across all of these elements.

I am sure you can identify other preconditions. A sustainable, unpolluted environment with lands that are habitable and air and water to support life? Viable mechanisms for resolving disputes and for enforcing laws? These are essential for any functioning society under any system of government. Perhaps democracy's preconditions involve a Bill of Obligations, including the duty to reject violence in the face of political disagreement.²⁴⁹ Steps to cultivate a culture of commitment to democracy and to communities, exemplified by a mandatory year of universal national service for people in their late teens, could be a vital ingredient.²⁵⁰ Mechanisms to protect equal conditions and improve the effectiveness of voting and representation by enlarging the House of Representatives, enacting ranked-choice voting, establishing independent commissions to draw voting district lines, and enacting limits on campaign contributions seem critical to many who are concerned with anti-majoritarian features of the U.S. Constitution.²⁵¹

Those anti-majoritarian elements of the U.S. Constitution may make the United States particularly vulnerable to seizure by extremists.²⁵² Failures in education, media, and safety destroy the preconditions for bridging divides that demagogues seek to create and exploit. Education opens people up to experiences and worldviews beyond their own. Without the shared understanding of reality created by access to reliable information, people lack the information relevant to setting priorities and meaningfully engaging with others.²⁵³ Profound fears about physical safety created by gun violence interfere with the trust and mental space to think, all demanded by democratic participation.²⁵⁴ Without education, reliable news, or a sense of safety, how can the people check the powerful and govern themselves?

249. HAASS, *supra* note 14, at 87-94.

250. See COMM'N ON THE PRAC. OF DEMOCRATIC CITIZENSHIP, *supra* note 94, at 9.

251. See *id.* at 6.

252. STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT 169-71 (2023).

253. See SHATTUCK ET AL., *supra* note 163, at 256-59.

254. See PEW RSCH. CTR., *supra* note 215, at 4, 6.

Reforming these features would take mass movements for a new constitution—and it is not clear to me that the result would be a democratic one. I have focused on education, sustainable and trustworthy news sources, and fulfilling the majority’s desire for public safety in a nation awash in guns. Democracy does not involve simply voting; constitutional democracy is not merely the written or unwritten principles. Those who have recently fought hard for constitutional democracy have much to teach those of us who simply inherited a version of it. Consider the insights of Cyril Ramaphosa, once a freedom fighter against Apartheid in South Africa and now its president: “Democracy therefore does not merely consist of the achievement of popular access to all important centres of power, and [the] complementary guarantee of certain fundamental rights. It consists also of social mechanisms, institutions[,] and forces which reinforce and deepen the formal processes of democracy.”²⁵⁵

William Hastie, a civil rights advocate and, later, federal judge, once explained, “Democracy is a process, not a static condition. It is becoming rather than being. It can be easily lost, but never is fully won. Its essence is eternal struggle.”²⁵⁶ That struggle cannot be confined to political parties or elections. It also must involve people in pursuing the public good as they see it.²⁵⁷ Discussion of preconditions for constitutional democracy is an invitation to participate in that struggle.

255. Cyril Ramaphosa, *The Main Elements of Democracy: A South African Experience*, in *DEMOCRACY: ITS PRINCIPLES AND ACHIEVEMENT* 73, 78 (Inter-Parliamentary Union ed., 1998).

256. CALHOUN ET AL., *supra* note 5, at 128 (quoting Judge William Hastie).

257. *See id.* at 286; MANVILLE & OBER, *supra* note 41, at ix, 2-5.