

**BRENNAN
CENTER**
FOR JUSTICE

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DEMOCRACY CAN'T WAIT

ANNUAL REPORT 2021



**BRENNAN
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FOR JUSTICE
NYU | LAW

“
We must meet
the challenge
rather than
wish it were
not before us.”

Justice William J. Brennan Jr.

CONTENTS

6 Democracy Under Attack

Electoral Sabotage	10
Election Officials	14
Unfair Districts	16
Presidential Powers	18

20 How We Worked

Case Study	22
Advocacy	26
Communications	28

32 Events

Events	34
Brennan Legacy Awards	38

40 Up Next

Reforming DHS	42
How Money Drives Mass Incarceration	44
A Right to Conceal and Carry?	46

48 Financials

Financials	48
Special Funds	50

51 Supporters

Our Supporters	51
Pro Bono Partners	59
Who We Are	60



DEAR FRIENDS,

Democracy. Justice. Equality. The rule of law. These fundamental American values face grave threats, and in 2021, the Brennan Center for Justice at NYU School of Law fought back.

In a year marked by waves of state laws intended to suppress the votes of Black, Latino, Asian, and Native American citizens, the organization was a vital watchdog — documenting, exposing, and explaining these attacks. Our research sparked massive news coverage. Lawmakers, journalists, and activists relied on our work. Our attorneys won victories for an accurate census count and to overturn gerrymandering in Ohio. Our reporting helped spur the first arrest of a perpetrator for intimidation of an election official.

The Brennan Center has been building toward this moment since it was founded just over a quarter century ago. From a small startup inspired by Supreme Court Justice William J. Brennan Jr.'s devotion to core democratic freedoms, the Brennan Center has become one of the nation's leading legal and policy institutions. With an annual budget of \$41 million last year, and a staff of 150 attorneys, scholars, researchers, and writers, the organization has also built critical reserves to ensure our continued work.

As historian and author Robert Caro recently noted, the Center is “a resource for liberals that was vitally necessary: a think tank that they can go to for the facts, the information, that they can rely on, for those facts and information have been assembled with an uncompromising intellectual honesty and rigor. Michael Waldman and the Center’s staff have done something quite extraordinary: They have built, in just a few years, an *institution*, a vital institution that is here to stay.”

Today, the organization has honed a distinct model, combining elements of a think tank, a legal advocacy group, and a communications hub. Reforms we have championed for decades became the centerpiece of the biggest push for voting rights in half a century, galvanizing a coalition of breadth, diversity, and depth. The Freedom to Vote: John Lewis Act came within two votes of transformative change in early 2022. The fight will continue.

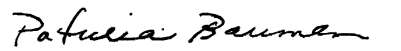
We are also steadfast in our efforts to build a just legal system and to strengthen the rule of law. Our Punitive Excess series combined expert commentary with storytelling to show the human suffering caused by mass incarceration. Lawmakers and activists called on our experts to help craft strategies that would restore the balance between liberty and national security. Twenty years after 9/11, this struggle, too, continues.

Our supporters and partners make all this work possible, and we are grateful for your steadfast commitment. We thank you for championing our efforts, recognizing that it is both the work of today and a long-term commitment.

Protecting our democracy and fighting for equal justice are a constant struggle. The Brennan Center will never give up. Your enduring belief in us is what will ensure lasting change.



Robert Atkins
Co-chair, Board of Directors



Patricia Bauman
Co-chair, Board of Directors

DEMOCRACY CAN'T WAIT

In 2021, the Brennan Center's work moved voting rights to the center of public debate. In 2022, that's where we're going to keep it.



A year ago, I wrote in these pages that we were in a great fight for the future of American democracy. That fight has continued, with rising stakes for our nation.

The 2020 election was a civic triumph. Despite the pandemic, it had the highest voter turnout since 1900. The response? Donald Trump's Big Lie of a stolen election. The January 6th insurrection. And a wave of new laws to restrict the vote in states across the country, also driven by that Big Lie, laws that targeted voters of color with uncanny precision.

At the same time, we had reason to hope that a season of reform would follow.

The Freedom to Vote: John Lewis Act — the most important voting rights and democracy reform in a half century — drew heavily on the Center's research and advocacy. It came within two votes of passage, but in its defeat, we see the growth of a powerful, energized, diverse movement for democracy.

The Brennan Center has long argued that our systems urgently need repair. Our proposal for automatic voter registration, developed in 2007, is now the law in 19 states and DC. In 2009, we drafted legislation to restore voting rights to all formerly incarcerated citizens. We published the first national proposal

for small donor financing in response to the 2010 Citizens United decision. All these were core parts of this vital federal legislation.

We pressed leaders to lift the issue to the center of public debate. It wasn't always easy. ("Nobody cares," a senior House leader told me a few years ago.) But in 2021, the measure became a key congressional priority (dubbed H.R. 1 and S. 1.). Speaker Nancy Pelosi and Majority Leader Charles Schumer led the drive for enactment. President Joe Biden declared, "We are facing the most significant test of our democracy since the Civil War."

The legislation passed the House of Representatives. All focused on the Senate, where a filibuster loomed. As anti-voter legislation loomed in his home state, Sen. Raphael Warnock (D-GA) said in his maiden speech: "It is a contradiction to say we must protect minority rights in the Senate while refusing to protect minority rights in the society. Colleagues, no Senate rule should overrule the integrity of our democracy, and we must find a way to pass voting rights whether we get rid of the filibuster or not."

The Brennan Center was deeply involved in the remarkable drive for enactment — a coalition of civil rights, good government, grassroots, business, labor, and religious groups. Our experts testified nine times

before Congress on voting rights, democracy, and redistricting. Our Voting Laws Roundup — rigorous and respected — generated wide attention. We routinely briefed dozens of reporters. Our attorneys worked with lawmakers and staff as they honed complex provisions.

For the first time in decades, voting rights dominated political conversation. Support became a Democratic Party signature. The measure was wildly popular. The fight all but shattered Senate support for the filibuster, which has been killing civil rights legislation for well over a century. When the measure went to the Senate floor, it commanded majority support, and 48 senators moved to bring it to a final vote. But two Democrats, Joe Manchin of West Virginia and Kyrsten Sinema of Arizona, would not change the filibuster rules so it could pass. It was a tremendously frustrating moment.

Now, we build. We know that reform often grows from defeat. Voting rights legislation failed in 1957 and 1964 before passing in 1965. For the year ahead, we focus on the immediate challenges that flow from the effort to sabotage American elections. If Congress cannot act because of the filibuster, and if federal courts will not act, we must act to ensure free and fair elections.

The Brennan Center will work with embattled election officials, providing legal, technological, law enforcement, and communications assistance. We will fight voter suppression and gerrymandering. All state constitutions but one explicitly protect the right to vote, and we will pursue remedies in state courts. We will continue to document and publicize the attacks on our democracy.

This is an inflection point for other Brennan Center work as well. Rising crime, for the first time in decades, threatens to derail criminal justice reform, a racial justice imperative of our time. Twenty years after 9/11, we have a fast-closing window to curb abusive executive power. The supermajority of radical conservatives on the U.S. Supreme Court will force us to map new strategies for legal and constitutional change.

In all these areas, we aim to craft the next generation of innovative reforms, new thinking, and public arguments. The Freedom to Vote Act drew on ideas first developed by the Brennan Center more than a decade ago. We aim to craft the reforms that will fuel movements for change in the coming decades.

We will also use our growing media, social, and digital capacity in the service of Abraham Lincoln's maxim: "With public sentiment, nothing can fail," he said. "Without it, nothing can succeed."

That's the core of our strategy and the core of the Brennan Center model, honed over a quarter century. We believe we can win majority support for our views. That is the only way that lasting positive change has been achieved throughout our history. To do this, we build broad and diverse coalitions. We combine rigorous research with an appeal to the patriotic values that serve as a goal and goad to positive change. We believe that facts can catch the conscience of the nation.

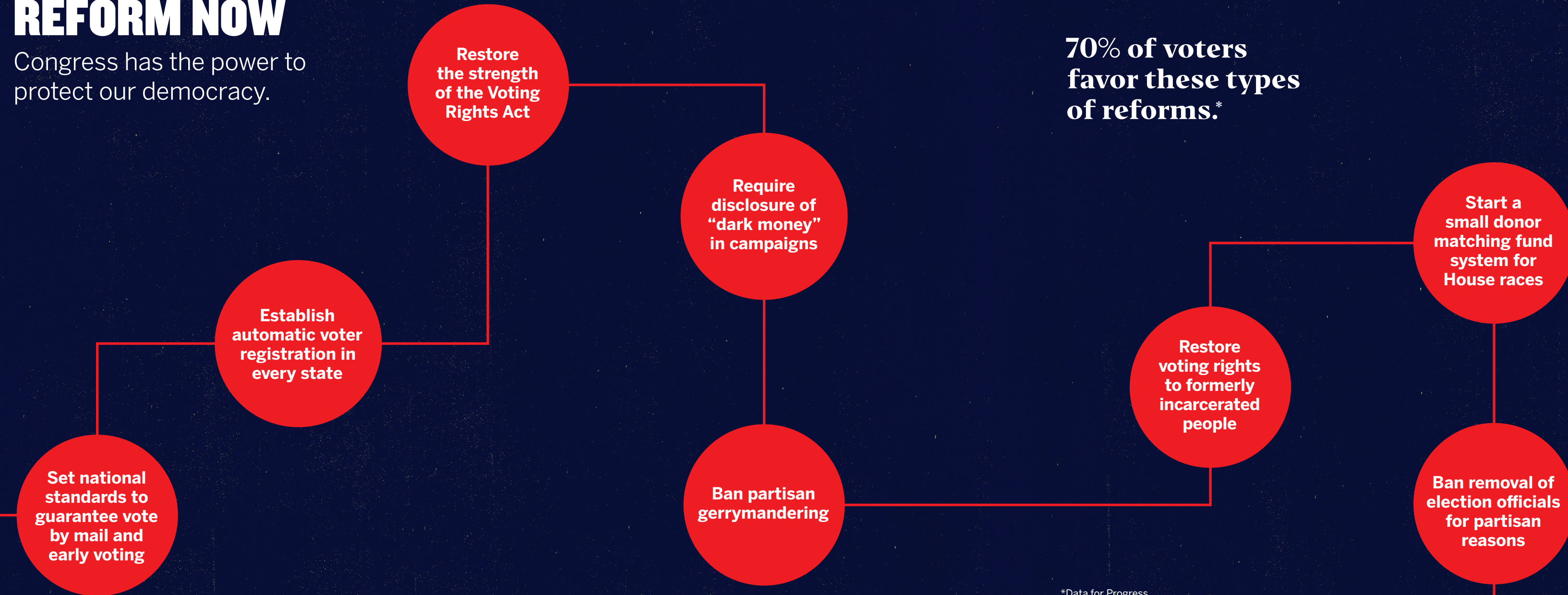
I have led this organization for the past 16 years. I have never been prouder of its people, and never been more convinced of the urgency of our work. The country we love is at stake. At a time of worldwide conflict between democracy and authoritarianism, we are committed to doing our part.

A handwritten signature in black ink that reads "Michael Waldman". The signature is fluid and cursive, with a long horizontal line extending to the right.

Michael Waldman
President

VOTING RIGHTS REFORM NOW

Congress has the power to protect our democracy.



70% of voters favor these types of reforms.*

*Data for Progress



“There is a moral obligation to act, and Congress also has an obligation to voters — especially voters of color — to stand up for these rights.”

Wendy Weiser
Vice President, Democracy



Illustration by
Dan Bejar

DEMOCRACY UNDER ATTACK

2021 began with an insurrection at the U.S. Capitol — followed by a stream of attacks on the people and laws that ensure fair and secure elections. Here's how we worked to defeat those threats, and what we're doing next.

10 **Electoral Sabotage** 16 **Unfair Districts**

14 **Election Officials** 18 **Presidential Powers**

THE TRUTH ABOUT THE BIG LIE

Joe Biden won the 2020 election — but one-third of Americans still don't believe it. Here are the facts:

25.5 MILLION

votes were cast in the six swing states that determined the winner of the 2020 election.

475
instances of potential voter fraud were identified by the Associated Press — 0.15 percent of the 311,257-vote margin of victory in those states.

ELECTORAL SABOTAGE

Using the Big Lie as a pretext, partisans are working to undermine future elections.

On January 6, 2021, as a mob breached the Capitol, America held its breath. Guns were drawn. Police officers were attacked. People died. For the first time in U.S. history, the transfer of power was not peaceful. Twelve hours later, when order was restored and Joseph R. Biden was finally declared the president-elect, we all exhaled. The insurrection had been defeated.

Or so we thought.

The rest of 2021 proved that the January 6th insurrectionists were not an isolated band of dead-enders bent on overturning President Biden's victory. They were, rather, the tip of the spear — part of a burgeoning movement set on falsely portraying our system of voting as broken so that antidemocratic legislators might transform our elections into an exercise of raw partisan power.



Following President Biden's victory, officials in Arizona, Michigan, Pennsylvania, Texas, and Wisconsin launched phony audits to cast doubt on the election. It worked. Although the 2020 election was widely recognized as the most secure in U.S. history, 80 percent of Republican voters still believe it was decided by fraud. That misconception fuels and justifies the election sabotage movement that has gained a foothold in state legislatures. No longer satisfied with voter suppression laws, antidemocratic lawmakers are bidding for power over election administration itself.

Illustration: Dan Bejar

Make no mistake: the antidemocratic lawmakers peddling the Big Lie will take as much power as we allow them.

In Georgia, for example, after Secretary of State Brad Raffensberger refused Trump's illegal demand to "find 11,780 votes," the legislature removed the secretary as chair of the state's elections commission. Arizona similarly punished its secretary of state — rescinding her power to defend the state's election laws in court until a new person takes office.

Other legislators have tried to go further, introducing bills that would give them the power to reject election results altogether. None of those bills have passed, and they are constitutionally suspect (to say the least), but their sheer audacity is a marker for the ambitions of the "stop the steal" movement.

Make no mistake: the antidemocratic lawmakers peddling the Big Lie will take as much power as we allow them. They are building a pseudo-scholarly basis for their power grab, dubbed the "independent state legislature doctrine." It claims the Constitution gives state legislators the exclusive power to make election rules and even decide results — with no role for state constitutions, courts, governors, or other officials. This ahistorical theory is built on a misunderstanding of the Constitution's Elections Clause, which James Madison intended as a broad grant of congressional power to prevent voter suppression and gerrymandering by

corrupt and partisan state legislatures. (It would be "impossible to foresee the abuses," he warned.) To hand those legislators unlimited power based on the Elections Clause would be constitutional upside-down land. No court has adopted this theory, but no matter. Expect a major constitutional fight in coming years.

The Brennan Center was and remains intensely engaged in the battle against election sabotage. Arizona's secretary of state tapped Elizabeth Howard, senior counsel for our Democracy Program, to monitor the fraudulent election review ordered by the legislature in 2021. Howard was on the ground at Veterans Memorial Coliseum in Phoenix, speaking regularly to the media and ultimately to the Department of Justice about the flawed process.

In Congress and in statehouses across the country, we pushed back against legislative attacks on free and fair elections, helping to defeat some of the worst bills. Brennan Center lawyers are pursuing litigation to strike down those that have passed, including a lawsuit led by Sean Morales-Doyle, acting director of the Voting Rights Program, to block parts of Texas S.B. 1 — a law that takes democracy back decades under the pretext of preventing fraud. Having published a full accounting of state-by-state election sabotage

efforts in 2021, we will continue to monitor threats across the country in 2022.

The Brennan Center will co-lead, along with fellow nonpartisan advocacy group Protect Democracy, the national legal effort to defend the Constitution's Elections Clause, marshaling scholarship, legal arguments, and communications plans. Recognizing the danger of the independent state legislature theory, Brennan Center president Michael Waldman and attorney Eliza Sweren-Becker have published the most comprehensive law review article to date about the history and meaning of the Elections Clause.

Most importantly, we continue to believe the best way to prevent election sabotage is to enact strong national standards for how elections must be run and what rights voters have.

You can draw a straight line from the wave of vote suppression we first tracked in 2011, to former president Trump's phony allegations of voter fraud, through the January 6th attack, to the election sabotage movement infecting state legislatures right now. The power to nullify an election is the brass ring they ultimately seek, but their efforts are far broader, including attacks on election officials, extreme partisan gerrymandering, and more. →

RESTRICTING THE VOTE

Last year, legislators in 19 states passed 34 laws that make it harder to vote.

“More and more, the right to vote is dependent on what state someone happens to live in.”

Eliza Sweren-Becker
Counsel, Democracy

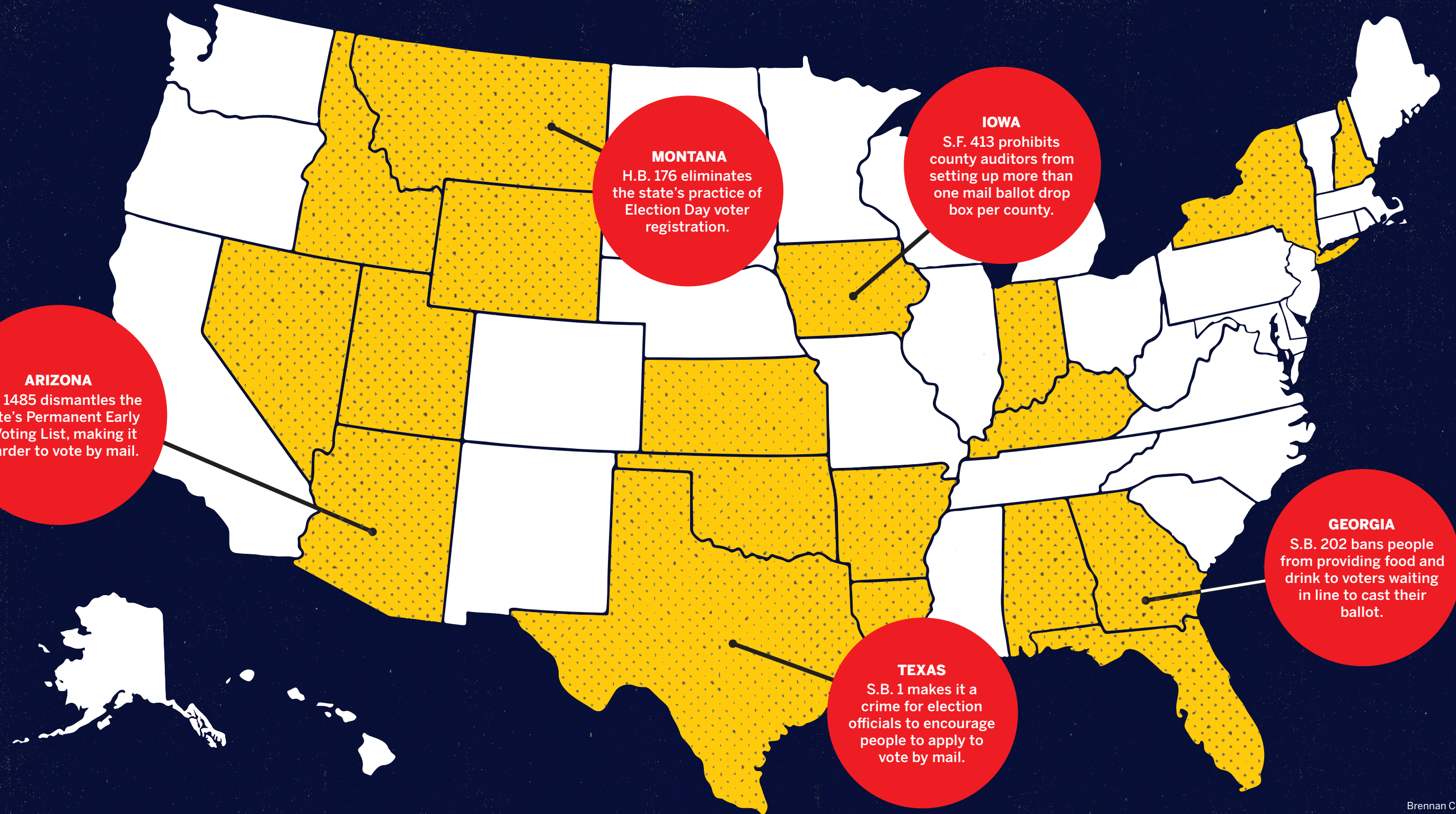
ARIZONA
S.B. 1485 dismantles the state's Permanent Early Voting List, making it harder to vote by mail.

MONTANA
H.B. 176 eliminates the state's practice of Election Day voter registration.

IOWA
S.F. 413 prohibits county auditors from setting up more than one mail ballot drop box per county.

TEXAS
S.B. 1 makes it a crime for election officials to encourage people to apply to vote by mail.

GEORGIA
S.B. 202 bans people from providing food and drink to voters waiting in line to cast their ballot.



ELECTION OFFICIALS

Violent threats and partisan lawmakers are driving people out of public service.

Protecting election officials is a key organizational priority for the Brennan Center. Half of election officials in America are concerned about their colleagues' safety, and one in four worry about being assaulted on the job, according to a survey commissioned by the Brennan Center. Since the 2020 election, public servants have seen their property vandalized, and some have had to send their families away to safety. The danger that the Big Lie poses to our democracy is widely reported, but the unprecedented and underappreciated menace it has brought to local officials is also deeply concerning.

Without doubt the Big Lie inspired these threats. Former president Donald Trump and his surrogates verbally assailed by name many of the targeted officials just before the threats commenced.

While anonymous threats and public intimidation chase honest people out of office — in Pennsylvania, for example, nearly one-third of election officials left their jobs in the months after the 2020 election — election deniers are working to take their places. At



least 10 candidates running for secretary of state and 8 running for attorney general have publicly backed the Big Lie, as have candidates for local election offices in swing states like Pennsylvania and Michigan. "We are witnessing an attempt to undermine our elections from within," says Lawrence Norden, senior director of the Elections and Government Program.

On top of all that, state legislators spent 2021 threatening election officials with legal penalties for simply doing their jobs. In the last year, six states have enacted laws creating new crimes, increasing existing criminal penalties, or creating new civil pen-

^ Following the 2020 election and false accusations by Trump officials, several election officials received threatening voice mails.

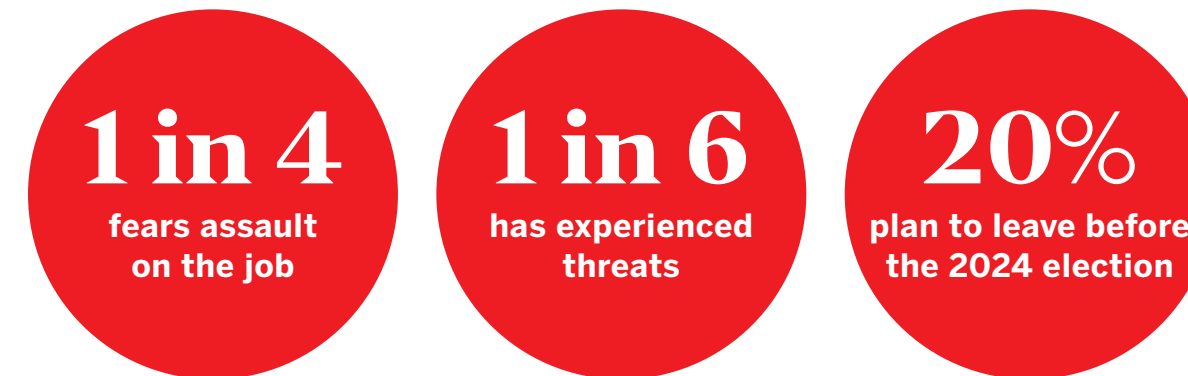
alties for legitimate election official actions or minor mistakes. More states have considered, but not yet passed, such laws.

What sorts of behavior would trigger these penalties? An Alabama poll worker can be punished for bringing a ballot to a disabled voter who cannot leave her car to enter the polling place. In Arizona, an election official who alters a deadline, even in response to an emergency such as a global pandemic, can be charged with a felony. A Texas election official who encourages a voter to apply to vote by mail could face a felony charge.

Elections are not self-executing. We need people to staff polling places, manage volunteers, and implement the laws that govern our elections. The Brennan Center is defending officials in court against threaten-

ing state laws. Our squad of former election officials — including former secretary of state of West Virginia Natalie Tennant and former top Virginia election official Elizabeth Howard — spent much of 2020 on the ground with public servants around the country. We have organized regular roundtables with key election officials, providing legal, policy, and communications help. Working with Microsoft and other business partners, we brought election officials together for tabletop exercises to map out challenges and plan responses. Our studies draw national attention to the threat. We continue to advocate for federal legislation to limit punitive actions that state legislatures can take against election administrators and to provide legal representation when they are threatened. →

THREATS TO ELECTION OFFICIALS



PROTECTING ELECTION ADMINISTRATORS

In 2021, following a Brennan Center recommendation, the Department of Justice launched a task force to investigate and prosecute those who threaten election officials. That effort has already produced results. Earlier this year, the DOJ announced two arrests: those of a Nevada man who had threatened the lives of an election worker and her children, and a Texas man whose internet post had threatened local officials and their families. According to election officials under threat, the Brennan Center's persistent focus on this issue has been critical to the positive steps being taken.

UNFAIR DISTRICTS

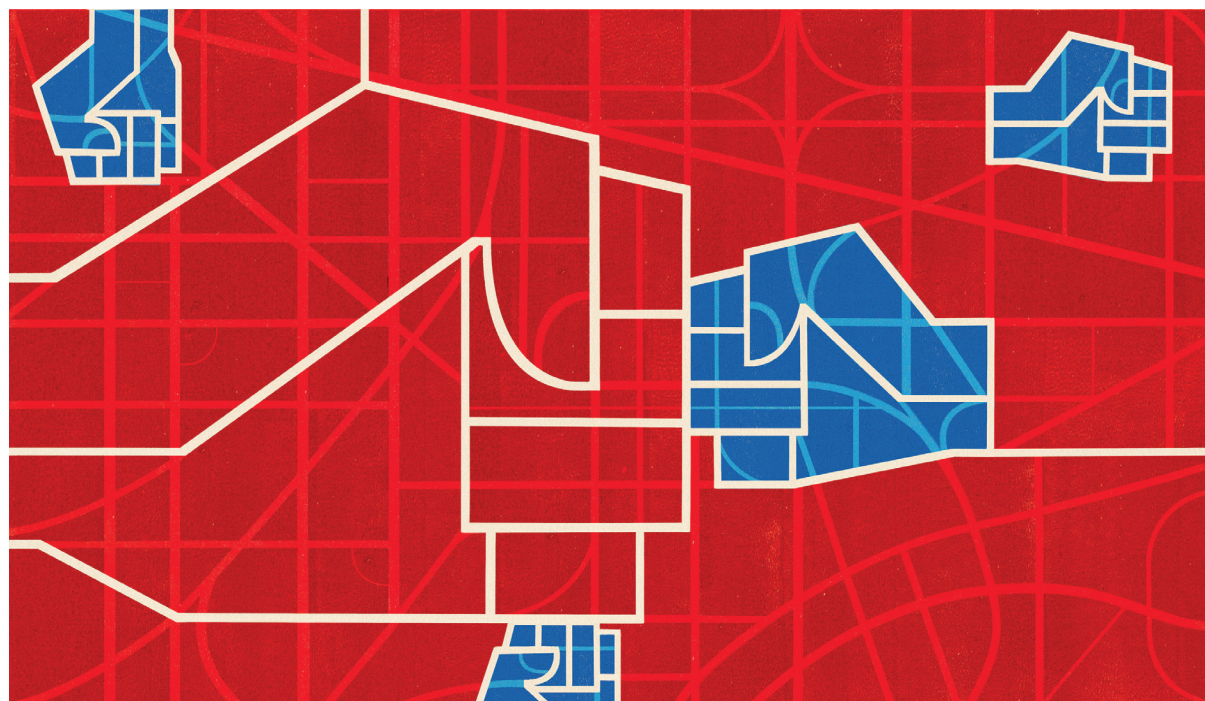
Free from most federal restrictions, partisans are using redistricting to entrench their power.

Redistricting is an inherently a politically fraught process. In the very first congressional election, even before Massachusetts Governor Elbridge Gerry became the unwilling namesake of the practice, Patrick Henry gerrymandered a district to try to keep James Madison from winning a seat in Virginia. Americans have always argued over the drawing of legislative districts.

The 2020–2021 redistricting process, however, has been unusual — a tale of two countries.

In parts of the country, fair maps took shape, often due to redistricting reforms championed by the Brennan Center. In a few key states, split party control prevented egregiously unfair redistricting. In other parts of the country, however, single party control produced maps with a sharp partisan and racial bias.

The 2020 Census confirmed that all of the U.S. population growth was in the South and Southwest, and nearly all of it among communities of color. His-



panic populations surged, as did Asian populations. Fair maps would reflect the reality of a changing America. Instead, the redistricting that unfolded choked off the voices of these emerging communities and denied them representation.

One important reason: legal guardrails have been largely removed. This is the first redistricting cycle since the U.S. Supreme Court gutted the Voting Rights Act, ending the Justice Department's ability to block racially gerrymandered maps before they take effect. Then the Court refused to police partisan gerrymandering, saying federal courts could not even hear

Illustration: Dan Bejar

those claims. And racial gerrymandering can be addressed only through protracted lawsuits, during which several elections can sometimes pass before a judge rules.

Technological progress has also contributed to intensified gerrymandering in certain states, multiplying its power. Modern computers can propose thousands of hypothetical legislative maps in a matter of minutes, and the granularity of data now used to compare voters would have boggled the minds of 20th-century gerrymanderers. Legislators can now place their map lines with surgical precision, maximizing their party's congressional share and minimizing competition in our elections.

The results parody democracy. In Texas, Democrats will have to win 58 percent of the vote to carry more than 37 percent of the state's seats. In other

words, Texas could turn a dark shade of blue and Republicans would still have a two-to-one seat advantage. New York's gerrymandered maps will deliver 85 percent of the state's congressional seats to Democrats in a state where Democrats represent just 53 percent of registered voters.

Without competition, state lawmakers face little accountability from voters. Donald Trump won 21 of the 24 districts on the new Texas congressional map by 15 points or more in 2020 — a near doubling of noncompetitive districts compared with the old map. Map drawers in Ohio, North Carolina, and Georgia used similar tactics, increasing super-safe districts for both Republicans and Democrats and decreasing competition in future elections.

This will worsen polarization, as primaries pull Republicans to the right and Democrats to the left.

It's a fierce battle for fair maps. The Brennan Center worked tirelessly throughout 2021 to combat partisan and racial gerrymandering in state courts (see "Fair Districts," below), and our research provided evidence for those seeking to enforce their rights. Senior Counsel Michael Li has made countless media appearances and written across traditional and social media to explain the scale of the gerrymandering problem and the need for fair maps. Many states have installed independent redistricting commissions, and we will continue to push in 2022 for more states to adopt them. Federal legislation to bar gerrymandering came closer to passage during the past year than it had been in generations. The public is ready for fair and competitive electoral maps, and the Brennan Center will provide the expertise to make that goal a reality. →

FAIR DISTRICTS

Two states where voters are gaining ground.

OHIO

Brennan Center litigators, led by Alicia Bannon, director of the Brennan Center's Judiciary Program, and our partners, scored an important victory against gerrymandering. The state supreme court struck down a map that discriminated against Black and Muslim voters and would have given Republicans a three-fifths majority. The map violated a state constitutional amendment banning partisan gerrymandering.

MICHIGAN

The Brennan Center helped draft the 2018 citizen-run ballot measure to create Michigan's independent redistricting commission. In the current cycle, it produced one of the most evenhanded and competitive election maps in the country. It's a big change from Michigan's partisan redistricting process in 2010 that produced a heavily gerrymandered map.

PRESIDENTIAL POWERS

By creating strong guardrails, we can prevent future abuse.

The founders recognized the vast powers of the presidency and foresaw the possibility of abuse. That's why they rejected Alexander Hamilton's proposal for lifetime presidential tenure and included a mechanism for impeachment. They hoped for presidents like their model, the incorruptible George Washington, but they feared a president like Donald Trump.

The Trump presidency was a stress test for the checks and balances the founders created. Although the system survived, Trump exposed several flaws that need repair.

For example, Trump abused presidential emergency powers, designed for quick action in a national crisis, by declaring an "emergency" when Congress would not fund his border wall with Mexico. Congress overrode that — the first time it has ever overridden an emergency declaration — but he parried with a veto, making clear the need for legislative action. The Brennan Center has recommended legislative reforms to strengthen safeguards against abuse of emergency powers, and lawmakers from both parties have introduced bills including these safeguards.

The Protecting Our Democracy Act (PODA) — which drew on recommendations made by the Brennan Center and by our bipartisan National Task Force on Democracy and the Rule of Law chaired by former

U.S. attorney Preet Bharara and former governor of New Jersey Christine Todd Whitman — would patch the system up in several ways.

PODA would time-limit emergency declarations unless Congress votes to extend them — one of the Brennan Center's key recommendations. There are currently several long-running national emergencies, some extending back decades. The bill would also incorporate another Brennan Center recommendation by requiring the president to provide Congress with documents that offer more information about the executive branch's interpretation and use of emergency powers.

"PODA would also ensure that the president is not above the law," says Elizabeth Goitein, director of the Liberty and National Security Program. Investigations of the president or his associates put the Department

of Justice in a hard spot. In such situations, the attorney general must gather evidence toward the potential prosecution of his own boss (who, by the way, has the power to fire the attorney general). PODA would require the attorney general to report communications with the White House to the inspector general, who would report abuses of presidential power to Congress. The law would also strengthen Congress's subpoena power to prevent executive stonewalling.

PODA would stop presidents from pardoning themselves (federal law is currently ambiguous on whether that outlandish step could be taken). It would suspend the statute of limitations on crimes committed by a president or vice president so they can't use their term to run out the clock. And it would protect whistleblowers who identify censorship of scientific research, ensure that future presidents cannot personally profit from their position, and finally bring transparency to the oft-controversial clemency process. These reforms are all long overdue.

The House of Representatives passed PODA on December 9, 2021. In 2022, we will continue to press the Senate for passage, as President Biden stands ready to sign into law this crucial curb on abuses of presidential power. ■

“The Protecting Our Democracy Act would also ensure that the president is not above the law.”

Elizabeth Goitein
Co-Director, Liberty and National Security

Illustration: Dan Bejar



HOW WE WORKED

In 2021, states enacted dozens of laws aimed at restricting voting rights. Hundreds more were proposed. The Brennan Center fought back with cutting-edge research, powerful digital platforms, and media outreach.

22 **Case Study**

28 **Communications**

26 **Advocacy**

Illustration by
Matt Chase



TRACKING VOTER SUPPRESSION

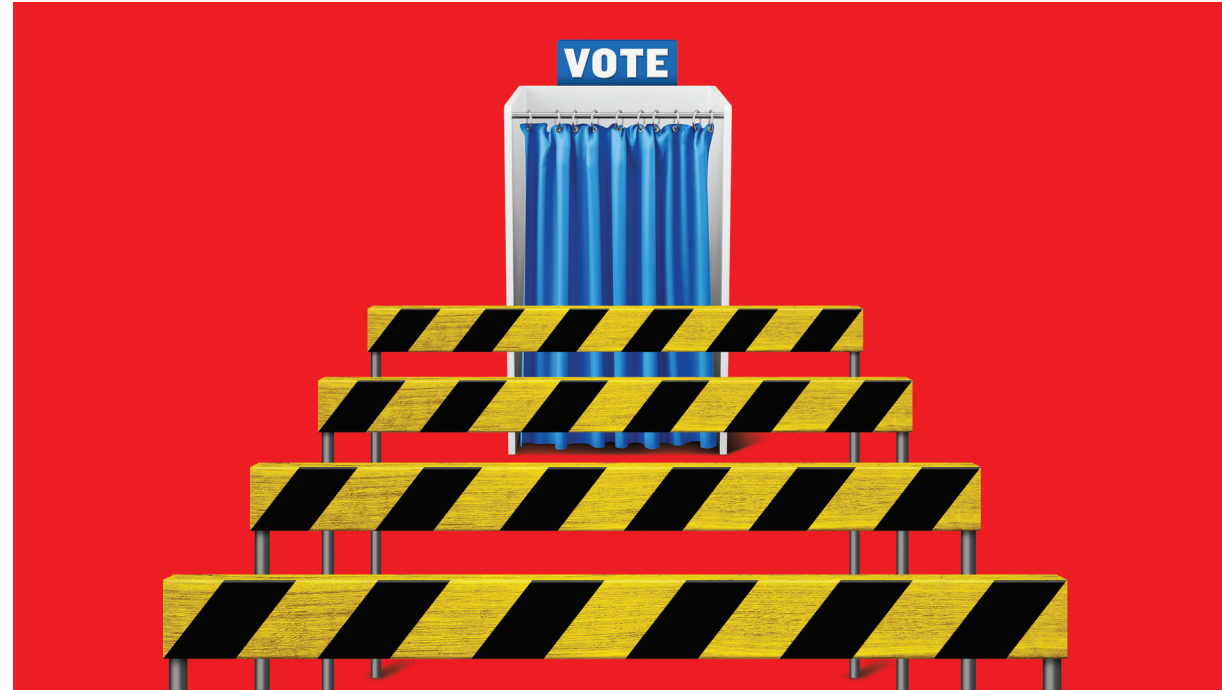
We monitored the nationwide assault on voting rights, garnering widespread press and legislative attention.

Of the thousands of media hits and millions of web visits the Brennan Center garnered in 2020, one particular Brennan Center project drove more attention than any other: our Voting Laws Roundup.

This project launched in 2011 as an annual survey of legislation and laws pertaining to voting at the state level. Often, these roundups focused on good news, as state legislatures made voting easier through policy innovations like automatic voter registration. But we also found evidence of bills that made it harder to vote — particularly for voters of color.

In 2021, these legislative trackers took on new importance. In response to former President Trump's Big Lie that the 2020 presidential election had been stolen, legislatures across the nation began to introduce hundreds of bills that would make it harder to vote.

The scope and volume of these bills presented a frightening new challenge, threatening the nation's democratic foundations. The Brennan Center's Voting



and Elections Program responded by ramping up its research, ultimately publishing seven trackers over the course of the year. They reported on whether proposed legislation was intended to restrict or expand voting rights, then followed the bills through the legislative process.

These reports generated 532,000 page views on BrennanCenter.org, and 127 related social media posts garnered 1.8 million impressions and nearly 20,000 engagements across Twitter, Facebook, LinkedIn, and Instagram. Media outlets cited the reports thousands of times, putting the Brennan Center in front of the critical national conversation about the threats to democracy.

Illustration: Matt Chase

Cause for Alarm

Brennan Center teams were alerted to the disturbing spread of these restrictive bills as we went to work on the first Voting Laws Roundup of the year, published just weeks after the January 6th riots in Washington, DC. Twenty-eight states had already introduced 106 restrictive voting bills — three times the number introduced during the same period in 2020. The bills were an unmistakable response to the unfounded and dangerous lies about fraud that followed the 2020 election.

Throughout 2021, each report brought more cause for alarm. By the end of the year, state legislators had introduced more than 440 bills with provisions that made it more difficult to vote. More worrisome, many were successful. By the end of the year, 19 states had passed 34 restrictive voting laws. These laws made mail voting and early voting more difficult, imposed harsh voter ID requirements, and made faulty voter purges more likely.

Arguably the worst bill that became law was Texas's S.B. 1. This sweeping voter suppression law makes it

harder for Texas voters with language barriers or disabilities to get help when casting their ballots, restricts election workers' ability to stop harassment by partisan poll watchers, criminalizes election officials for doing their jobs, and bans voting procedures — like drive-through voting — adopted to make voting easier during the pandemic.

After the bill became law, the Brennan Center filed a lawsuit against Texas in federal court for violating the U.S. Constitution, the Voting Rights Act, and the Americans with Disabilities Act. We filed another lawsuit seeking to protect the First Amendment rights of Texas election officials, including our client, an election administrator in Houston. Under S.B. 1, she could be prosecuted for encouraging voters to apply to vote by mail. If convicted, an election official would face fines of up to \$10,000 and six months to two years in jail. A judge in February blocked the state from enforcing the mail ballot application rule, but at this writing, both lawsuits are ongoing.

Breaking the News

As the evidence of this unprecedented threat to our democracy became clearer with each report, we got the word out to the media, members of Congress, and the public.

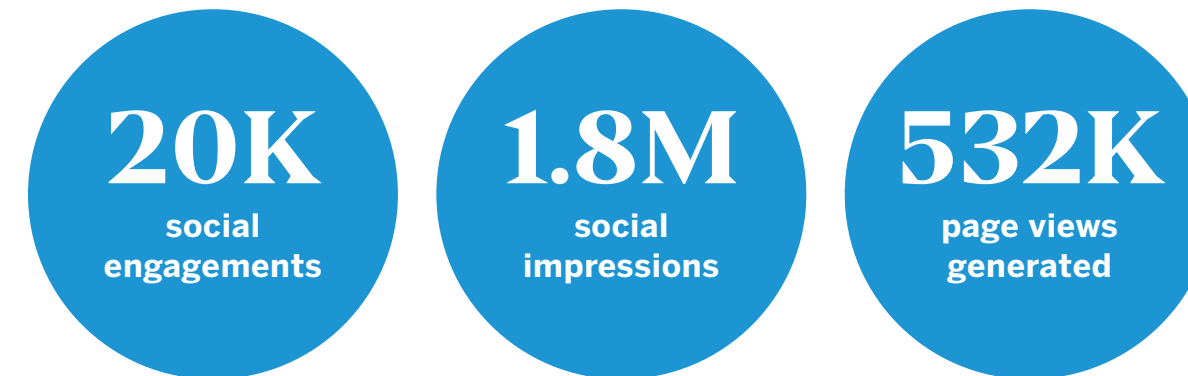
Reporters and editors jumped on every installment, with major stories on our findings getting play on top television news programs, editorial and opinion pages, and radio and podcast outlets. In between releases, the press — both national and local — repeatedly used our numbers to underline the extent of the problem, from coverage of lawsuits fighting Georgia's voter suppression law to stories about President Biden's voting rights agenda.

The trackers were mentioned more than 165 times on television news shows, with networks including CNN, C-SPAN, and MSNBC running story after story on our numbers, often creating maps to visualize the spread of both the legislation and eventually the laws. Editorial boards, including *USA Today* and the *Washington Post*, used the roundups to draw attention to the problem and call on Congress to pass federal legislation to stop this voter suppression in its tracks.

Our numbers documenting this assault on the vote were cited by the biggest newspapers and wire services in the country, from the *New York Times* to the Associated Press. Brennan Center experts hit the talk show circuit, with Michael Waldman joining *Morning Joe* in July to discuss this burgeoning anti-democratic movement. The reports were also cited in global outlets including *The Guardian*.

The widespread press coverage of these anti-voter bills resulted in controversy and outrage. By shining a light on these terrible bills, the roundups created a public relations nightmare for the legislators who introduced them. For instance, legislative language that would have rolled back Sunday voting, →

VOTING LAWS ROUNDUP BY THE NUMBERS



HOW WE WORKED: CASE STUDY

targeting “souls to the polls” voting drives in Black and Latino communities, were dropped from the bills after popular backlash ensued.

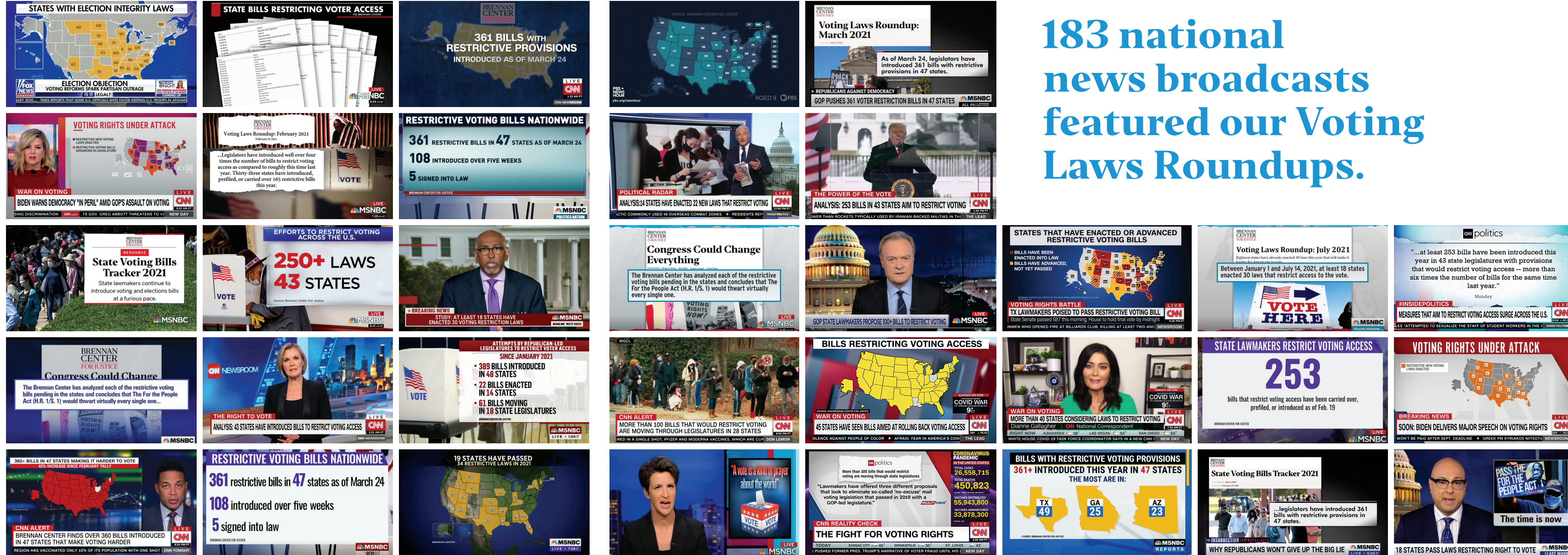
The roundups found a big audience in our nation’s capital, too, providing members of Congress with the hard facts and numbers around this legislative push in the states to restrict the vote. Representatives and senators, including Senate Majority Leader Chuck Schumer, highlighted these numbers in congressional hearings, on the floor, and during legislative markup sessions on federal voting rights legislation.

The roundups’ numbers even made it into President Biden’s January 2022 speech pushing for the Freedom to Vote: John Lewis Act. “Last year alone, 19 states not proposed but enacted 34 laws attacking voting rights,” the president told the nation. “There were nearly 400 additional bills Republican members of state legislatures tried to pass.”

The Threat Continues

The Brennan Center is continuing its legislative tracking in 2022, and we expect to publish updated roundups quarterly. The work has expanded to include a rising new threat — election sabotage bills that would allow partisan actors to interfere with election processes, remove nonpartisan election officials, or reject election results entirely.

These developments are made worse by gerrymandering, dark money, and disinformation — a combination that threatens self-government and meaningful representation in our multiracial democracy. The rise of this anti-democratic movement is a central fact for our work and our nation, and the Brennan Center will fight back with all the tools in our arsenal — crafting transformative solutions, fighting in court, advancing critical legislation, and shaping opinion by taking our message directly to our growing press and public audiences.



EXPERT TESTIMONY

Our staff appeared before Congress to advocate for our positions on voting rights, criminal justice, and constitutional protections.



MAY 18
Faiza Patel
Advocating for strengthening DHS's civil rights and liberties safeguards



JUNE 11
Kevin Morris
In support of the John Lewis Voting Rights Advancement Act



JUNE 24
Michael Waldman
In support of the John Lewis Voting Rights Advancement Act



JULY 27
Lauren-Brooke Eisen
On the unjust burden of court-imposed fees and fines



AUG 16
Wendy Weiser
In support of the John Lewis Voting Rights Advancement Act



OCT 7
Gowri Ramachandran
On the risk posed by sham election reviews



FEB 24
Mike German
On the rise of white supremacist and far-right domestic terrorism



MARCH 24
Michael Waldman
In support of the For the People Act



MAY 27
Wendy Weiser
In support of the John Lewis Voting Rights Advancement Act



JULY 16
Sean Morales-Doyle
In support of the For the People Act



JULY 28
Gowri Ramachandran
On the dangers of disinformation and election subversion



OCT 6
Wendy Weiser
In support of the John Lewis Voting Rights Advancement Act

GETTING THE WORD OUT

2021 by the numbers

48%

increase in *New York Times* mentions*

41%

increase in *Washington Post* mentions*

30-35%

approximate email open rate

9K

direct messages sent by our supporters to Senate offices asking for voting rights reform

ADVOCACY

SOCIAL

35,000,000

impressions across social channels

215,000

mentions of the Brennan Center from 87,000 external accounts

*2019 compared to 2021

AUDIENCE = INFLUENCE

Growth since 2017

2017 Baseline

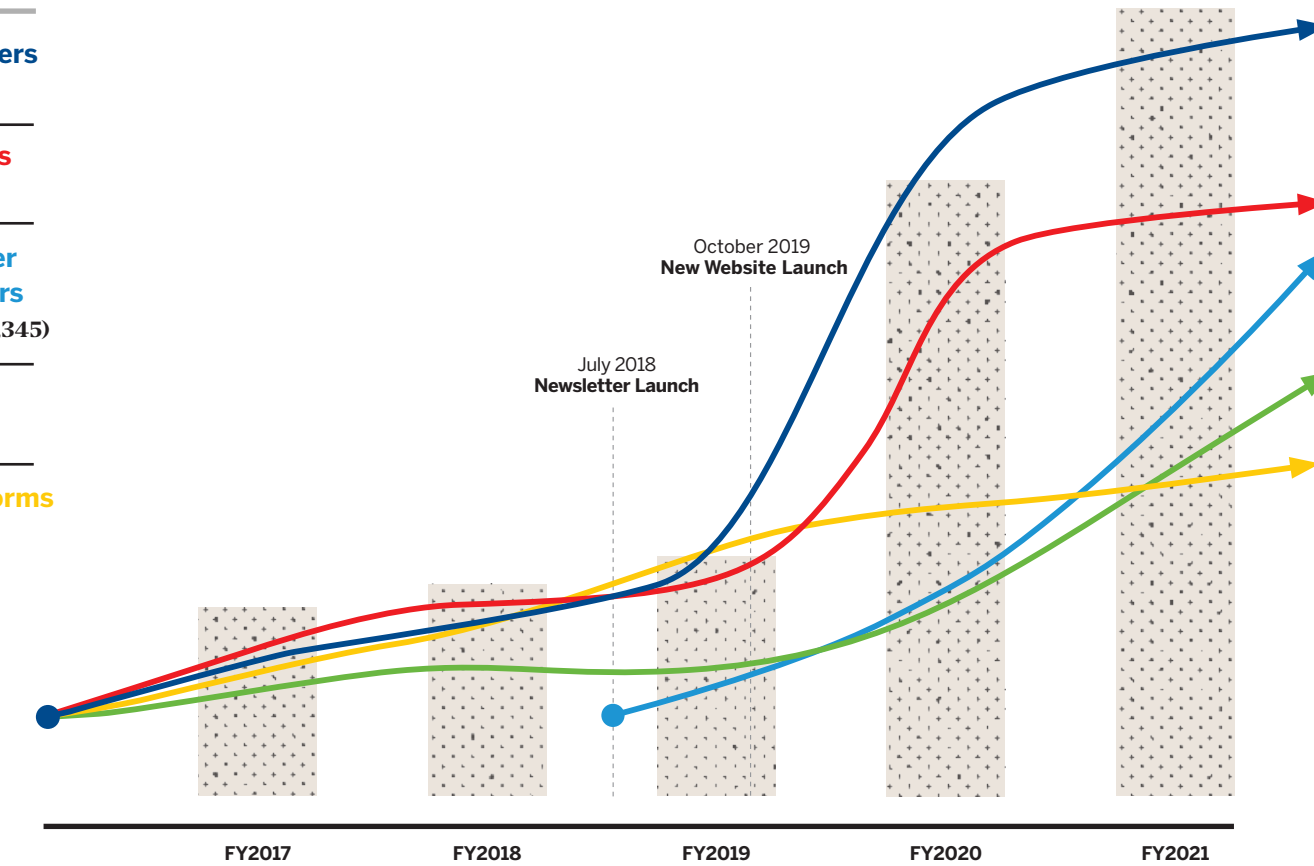
Website Users
1.1M

Press Hits
22K

Newsletter Subscribers
(Y1 in 2019 = 6,345)

Events
25

Social Platforms
136K



2021 Totals

4.5M
Website Users
+309%

65K
Press Hits
+191%

185K
Newsletter Subscribers
+2,800%

45
Events
+80%

274K
Social Followers
+101%

HOW WE WORKED: COMMUNICATIONS



Director of the Justice Program, **Lauren-Brooke Eisen**, appears on Fox 5 NY News on July 15, 2021, to discuss New York State's bail reform laws.



Theodore R. Johnson, director of the Fellows Program, joins *Prime with Charles Blow* on the Black News Channel on June 2, 2021, to discuss the threat voter suppression poses to democracy.



Elizabeth Howard, senior counsel for the Elections and Government Program, appears on MSNBC's *Ayman* on May 10, 2021, to discuss the sham audit of the 2020 election results in Maricopa County, Arizona. Elizabeth served as an official observer of the so-called audit for Arizona's secretary of state.



Wendy Weiser, vice president of the Democracy Program, talks on March 13, 2021, on MSNBC's *Velshi* about the wave of voter suppression bills around the country.



On April 6, 2021, Democracy Program Senior Counsel **Yurij Rudensky** appears on *Zerlina* on NBC's Peacock ahead of the release of the 2020 Census results to discuss what to expect in the 2021–2022 redistricting cycle.



Lawrence Norden, senior director of the Elections and Government Program, joins *Sunday Today* on NBC to discuss how Trump's "Big Lie" has triggered a fight over how elections work and who runs them.



Michael Li, senior counsel in the Democracy Program, appears on MSNBC's *The Sunday Show* on October 10, 2021, to discuss how the Texas Legislature's extreme gerrymandering robs communities of color of political power.



Elizabeth Goitein, co-director of the Liberty and National Security Program, joins CBS News' *Red & Blue* on September 27, 2021, to discuss privacy rights and the January 6th insurrection organizers.

The Brennan Center appeared on national news programs

280 times. That's up more than 367% since last year.

EVENTS

45 Brennan Center LIVE events, and audiences that topped 50,000 for the year, made our virtual stage the place to be in 2021.

34 Events

38 Brennan Legacy Awards



Illustration by
Mari Fouz



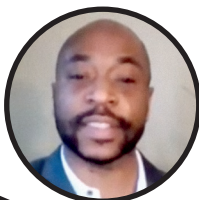
Midnight in Washington: A Conversation with Rep. Adam Schiff

From left, Rep. Adam Schiff (D-CA) and Brennan Center President Michael Waldman discussed Schiff's book, *Midnight in Washington: How We Almost Lost Our Democracy and Still Could*.



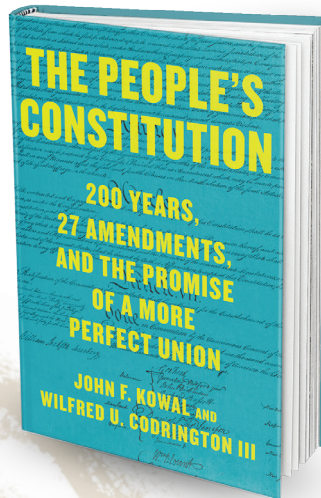
Immigration Reform: Presidential Power and the Road Ahead

Clockwise from left, Brennan Center board member and NYU School of Law professor Adam B. Cox and Cristina M. Rodríguez of Yale Law School discussed the debate about presidential power over immigration policy and their book, *The President and Immigration Law*. The program was moderated by Cecilia Muñoz, below, former director of the White House Domestic Policy Council under President Obama.



Four Hundred Souls: A Conversation with Keisha N. Blain, Donna Brazile, and Laurence Ralph

The coeditor of and contributors to *Four Hundred Souls: A Community History of African America, 1619–2019*, discussed their book with the Brennan Center's Theodore R. Johnson. From left, clockwise: Donna Brazile, former acting chair, Democratic National Committee; Laurence Ralph, professor of anthropology, Princeton University; moderator Theodore R. Johnson, director, Fellows Program, Brennan Center, and Keisha N. Blain, associate professor of history, University of Pittsburgh.



The People's Constitution

From left, counter clockwise, Brennan Center Fellow Wilfred Codrington and Vice President of Programs John Kowal discussed their book, *The People's Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union*. Ari Berman, senior reporter at *Mother Jones*, moderated.



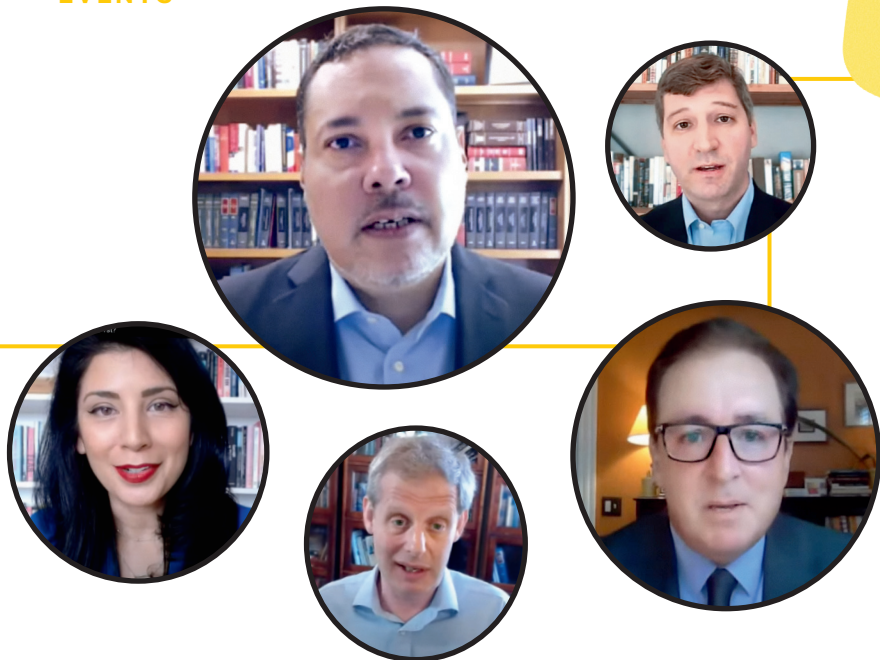
The Midterms: What to Expect Next November and Beyond

Democratic and Republican political strategists provided early insight on what will matter most in the 2022 midterms. From left, clockwise: Shailagh Murray, former senior advisor to President Barack Obama; moderator Bakari Sellers, CNN political analyst; Stephanie Cutter, former senior advisor to President Obama, and Alex Castellanos, former strategist, Romney-Ryan and Bush-Cheney presidential campaigns.

Justice on the Brink: Twelve Months That Transformed the Supreme Court

From left, Pulitzer Prize-winning *New York Times* writer Linda Greenhouse discussed her book, *Justice on the Brink: The Death of Ruth Bader Ginsburg, the Rise of Amy Coney Barrett, and Twelve Months That Transformed the Supreme Court*, with Brennan Center Board member and NYU law professor Melissa Murray.



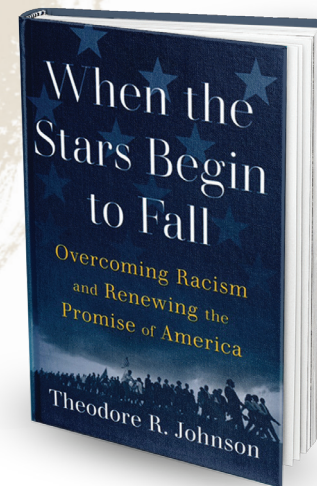
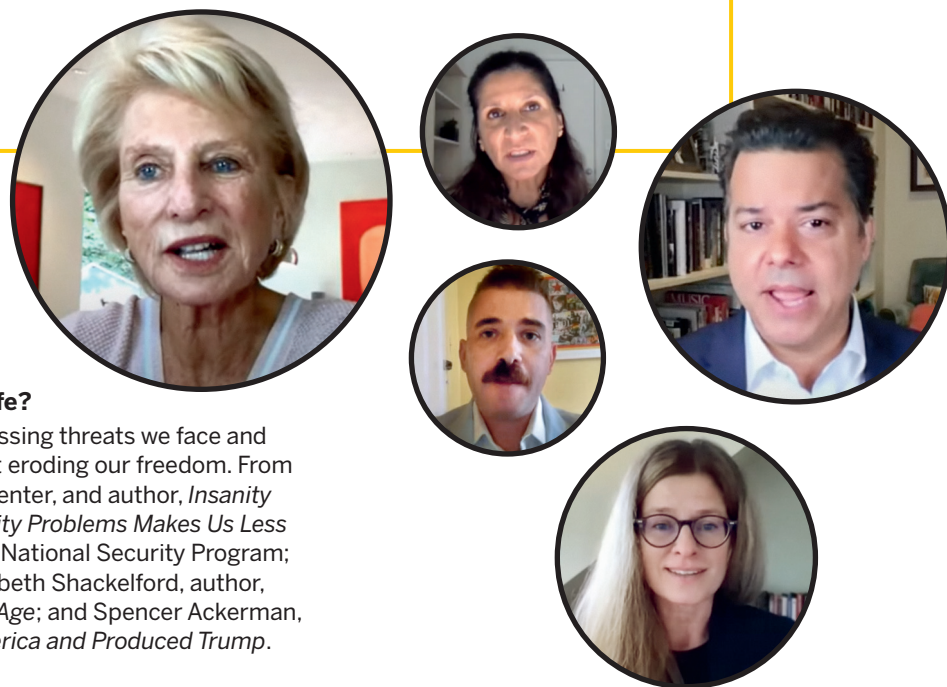


< **Guns vs. Speech: Does the 2nd Amendment Threaten the 1st?**

Can speech be free when armed counter-protesters mix with unarmed protesters? A panel of experts gathered to discuss what this looming conflict may mean in the Supreme Court. From left, clockwise: Mary Anne Franks, author of *The Cult of the Constitution: Our Deadly Devotion to Guns and Free Speech*; Darrell A. H. Miller, coauthor of *The Positive Second Amendment: Rights, Regulation, and the Future of Heller*; moderator Eric Ruben, Dedman School of Law and Fellow, Brennan Center; Tim Zick, William & Mary Law School; and Eugene Volokh, UCLA Law and founder of *The Volokh Conspiracy*, a leading legal blog.

> **What Will It Take to Keep Us (and Our Freedoms) Safe?**

Twenty years after 9/11, panelists discussed the most pressing threats we face and how the U.S. government can protect our security without eroding our freedom. From left, clockwise: Jane Harman, president emerita, Wilson Center, and author, *Insanity Defense: Why Our Failure to Confront Hard National Security Problems Makes Us Less Safe*; Faiza Patel, co-director, Brennan Center Liberty and National Security Program; moderator John Avlon, senior political analyst, CNN; Elizabeth Shackelford, author, *The Dissent Channel: American Diplomacy in a Dishonest Age*; and Spencer Ackerman, author, *Reign of Terror: How the 9/11 Era Destabilized America and Produced Trump*.



^ **When the Stars Begin to Fall**

In conversation with political commentator Karen Finney, Theodore R. Johnson, director of Brennan Center's Fellows Program, discussed his book, *When the Stars Begin to Fall: Overcoming Racism and Renewing the Promise of America*.

> **Institutional Reform to Protect Democracy**

Panelists discussed the Protecting Our Democracy Act, a landmark reform aimed at preventing future presidential abuses. From left, clockwise: Bob Bauer, former White House counsel and coauthor of *After Trump: Reconstructing the Presidency*; Preet Bharara, former United States attorney for the Southern District of New York and co-chair of the National Task Force on Rule of Law & Democracy; and Christine Todd Whitman, former governor of New Jersey, former administrator of the Environmental Protection Agency, and co-chair of the National Task Force on Rule of Law & Democracy.



^ **CRISIS: Harrowing Presidential Transitions from Lincoln to Biden**

Panelists discussed the peaceful transfer of power. From left, clockwise: Ted Widmer, author, *Lincoln on the Verge: Thirteen Days to Washington*; Jonathan Alter, author, *The Defining Moment: FDR's Hundred Days and the Triumph of Hope and His Very Best: Jimmy Carter, a Life*; and Hon. Donna F. Edwards, columnist, the *Washington Post*, and former congressional representative (D-MD, 2008–2017).



BRENNAN LEGACY AWARDS

TWENTY-FIVE YEARS

A VIRTUAL CELEBRATION

We held the annual Brennan Legacy Awards on November 16 — a one-night-only virtual event celebrating our 25th anniversary and honoring leading voices from the fight for democracy and justice.



Honorees **Kenneth I. Chenault** (top right) and **Kenneth C. Frazier** (bottom) discussed their remarkable campaign to mobilize business leaders against voter suppression.



Brennan Center Board members **Kimberley D. Harris** (left) and **Christine A. Varney** hosted the evening program.



Ford Foundation President **Darren Walker** received the Legacy Award in recognition of his lifelong commitment to justice.



More Than a Vote CEO **Addisu Demissie** and WNBA All-Star **Renee Montgomery** accepted the Legacy Award on behalf of their coalition of athletes and artists.

VOTING RIGHTS LEADERS IN CONGRESS HAD A SPECIAL MESSAGE FOR OUR VIEWERS.



Sen. Alex Padilla (D-CA)



Rep. John Sarbanes (D-MD)



Rep. Lauren Underwood (D-IL)

Illustration by
Nick Ogonosky



UP NEXT

Brennan Center staff are developing research and creating new policy solutions — all aimed at building a more perfect union.

42 **Reforming DHS**

44 **How Money Drives
Mass Incarceration**

46 **A Right to Conceal
and Carry?**

REFORMING DHS

The Department of Homeland Security's decisions should be based on evidence, not biases.

Twenty years after its founding, discussions about the Department of Homeland Security (DHS) often revolve around how the department violates people's civil rights and liberties rather than how the gigantic department keeps people safe. Faiza Patel, director of the Brennan Center's Liberty and National Security Program, explains how things came to be this way and discusses a forthcoming series of Brennan Center reports that offer policy solutions to set things right.

This year marks the 20th anniversary of the Department of Homeland Security's creation. How effective has the department been at keeping Americans safe while respecting their civil rights and liberties?

DHS, which was created in response to the 9/11 attacks, contributes to counterterrorism efforts primarily by sharing intelligence with state and local law enforcement and by vetting for national security threats in immigration and travel. It's difficult to judge how much the department has contributed to keeping Americans safe through these efforts because DHS often fails to measure whether its programs actually enhance public safety.

For example, starting in 2003, DHS ran a program called SPOT that sought to identify potentially risky

passengers at airports. The program, which cost upwards of \$1.5 billion, deployed 3,000 TSA officers to airports across the country looking for such supposedly suspicious behaviors as gazing down, or wearing improper attire for the location. Repeated audits by the Government Accountability Office and the department's inspector general found that DHS had no valid evidence that most of its indicators would help identify people who pose a threat and had failed to measure the program's effectiveness.

DHS's programs have also been dogged by reports that they discriminate against minorities. In 2012, 30 of the officers charged with implementation of the SPOT program told the *New York Times* that it had become a racial profiling program targeting Middle Easterners, Black people, Latinos, and other minorities. As the Biden administration has recognized, the department's efforts to counter violent extremism unfairly single out American Muslims.

Racial justice protesters have also been targeted. In the summer of 2020, DHS's intelligence arm responded to potential threats of graffiti and vandalism at protests with counterterrorism tools. It even issued intelligence reports on journalists who had been critical of the department's tactics. State-based fusion centers, through which DHS coordinates with state and local officials, have also seriously undermined civil rights and civil liberties, from monitoring American Muslim groups advocating for civil rights and hosting talks on innocuous subjects to circulating intelligence reports about Black Lives Matter activists and Juneteenth celebrations.

Unfortunately, the oversight mechanisms created by Congress to ensure that DHS protects our privacy and civil rights and liberties have not proved strong enough to guard against these types of abuses — and they are legion. And Congress itself has often been lax in holding the department to account.



“Profiling based on race, religion, and national origin is as wrong as it is ineffective.”

Faiza Patel

Co-Director, Liberty and National Security

One subject your research centers on is DHS's massive and growing capability to collect information on Americans. What is the danger of this large-scale data harvesting and analysis?

Privacy and freedom of speech and association are the preconditions for Americans to fully participate in our democracy. The government should not undermine these constitutional rights unless it suspects violations of the law. DHS accumulates vast databases of information about millions of innocent Americans without their consent and draws inferences from this data in ways that can lead to adverse consequences for individuals.

Its risk assessment algorithms flag people for search and interrogation, but those selected have very limited ability to contest the determinations or to even know that they have been flagged or why. DHS's targeting of people based on religion, ethnicity, and race is also a concern. The department's anti-discrimination policies contain substantial loopholes

that allow agents and algorithms to functionally rely on these characteristics to evaluate risk. Last, there is the issue of data security. The multitude of breaches of government databases containing personal information caution against the ever-increasing consolidation of information.

What would you say to critics who suggest that there is a national security advantage to profiling, one that would be lost by instituting safeguards against it?

Profiling based on race, religion, and national origin is as wrong as it is ineffective. Discriminatory assumptions have a terrible cost, both to the individuals who suffer their consequences and to our nation's goal of “liberty and justice for all.” Moreover, as DHS has explicitly recognized, profiling is not an effective law enforcement or screening tool because it wrongly assumes that characteristics like a person's race or ethnicity are predictive of the likelihood that they will

engage in misconduct. Both of these principles hold true for national security as well.

Your program's series of reports concentrates on public policy solutions to the problems you identify. What policy change would go the farthest in reforming the department?

There is no silver bullet for fixing DHS. Three broad categories of changes are essential. Leadership needs to prioritize respect for constitutional norms and take concrete steps to empower the DHS offices that are dedicated to protecting privacy and civil rights and liberties. The agency must also create a system to make sure programs are effective. And finally, leadership must implement stronger policies against profiling and targeting of First Amendment-protected activities.

Without these changes, the department will continue to use methods that violate Americans' civil liberties and rights and undertake programs without measuring whether they make us safer. →

HOW MONEY DRIVES MASS INCARCERATION

A forthcoming Brennan Center report analyzes the perverse incentives that distort criminal justice.

Nationwide indignation at over-policing and mass incarceration has yet to result in significant change as reform efforts have stalled. Going forward, if reformers want to win lasting change, they need to account for the motivations at play, argues Ram Subramanian, managing director of the Brennan Center's Justice Program. A forthcoming Brennan Center report addresses deeply ingrained incentive structures that push the criminal legal system to respond to money more than to public safety and fairness.

Your big project this year is on perverse incentives within the criminal legal system. What do you mean by perverse incentives? How do they distort the system and produce bad results?

Money plays an outsize role in American criminal justice policy. Our report examines the fiscal and economic incentives that turn law enforcement officials into sources of government revenue. The system is rife with perverse incentives, from the fines and fees extracted at every stage of the criminal legal process

to the growing market for correctional and detention beds to deal with overcrowding. The latter has become the financial lifeblood to many underfunded localities, but it results in the appalling trade of imprisoned people across federal, state, or county lines.

We also discuss more diffuse financial motivations at work: performance metrics that reward increased enforcement with better career opportunities and perks. For police, more stops, citations, and arrests can lead to better shift locations and hours. Prosecutors are incentivized to rack up ever-greater indictments, trials, convictions, and sentence lengths. Direct rewards for these prosecutors and police can include everything from internal promotions to opportunities for career advancement to recognition through departmental awards. And when prosecutors win more indictments, trials, convictions, and longer sentences, these "successes" can generate lucrative career opportunities when they exit the profession, such as federal judgeships or partnerships in large private practices. The result is a justice system incentivized to enforce laws in ways that value punishment above all else.

The challenge is that these financial motivations — and their budgetary effects — have become persistent and self-reinforcing. As local governments and law enforcement agencies grow increasingly dependent on these sources of revenue, any cost-benefit analysis will favor enforcement dominated by self-interest, not public safety. Public welfare and safety should be the focus of law enforcement agencies, but they are likely to play second fiddle to the dollar signs many enforcement actions currently represent.

What role does confronting these perverse incentives play in the fight to end mass incarceration?

Even though nearly all 50 states, many counties, and the federal government have focused political efforts on reducing the footprint and long-term impacts of imprisonment, incarceration levels remain extraordinarily high. There are nearly 1.3 million people in state and federal prisons and 10.3 million admissions to local jails every year. Recidivism rates, too, remain stubbornly high.

Building America into the incarceration nation required not only harsher sentencing policies but also the creation of rules, practices, and incentives to motivate and encourage this growth. Our report sheds light on this infrastructure that encourages increased criminal enforcement by offering financial and economic benefits to law enforcement officials, agencies, and governments. These structures fundamentally shape how criminal justice practitioners behave, challenging the assumption that public sector actors are free of financial motivation.

Unwinding mass incarceration requires unwinding these economic incentive structures. If we don't, then revenue-driven enforcement will remain the order of the day.



“There is a growing perception that the primary role of the criminal justice system is bill collection.”

Ram Subramanian
Managing Director, Justice

Has your research identified an incentive that warps the system more than the others?

Perhaps the most insidious incentive structure is what we broadly call “user-funded” justice.

The calculus is simple. More people cycling through the system means more money for the locality, agency, or contracted private firm. People subject to criminal enforcement are increasingly asked to reimburse the enforcement machinery that punishes them, often at every stage of the criminal process. Payments are extracted via traffic citations, criminal fines for minor offenses, court surcharges, supervision fees, and property seized for alleged links to criminal activity — now all routine features of American criminal punishment. There is a growing perception that the primary role of the criminal justice system is bill collection. Unsurprisingly, these incentives are strongest when enforcement agencies are allowed to retain all or some of these proceeds — an all-too-common arrangement.

This promotes predatory enforcement that singles out certain individuals to subsidize mass enforcement and mass incarceration. As we saw in Ferguson, Missouri, this incentive structure can drive the enforcement of every colorable offense, especially when budgets are tight. Police, prosecutors, sheriffs, and courts are pressured to decide which laws to enforce and how people should be punished based on the financial needs of their agency rather than public safety. This burden falls too often on the poorest, most disenfranchised communities, further exacerbating existing social inequity and dislocation. And like many other aspects of the U.S. criminal legal system, these practices, along with all their adverse costs and consequences, have a disproportionate impact on people of color.

Debt stemming from justice system involvement is tied to increased risk of incarceration, reduced lifetime earnings, and increased financial instability. These social costs are not typically accounted for in

the government ledger, and they often go ignored when policymakers attempt to “balance” the books.

How can reformers purge the system of these perverse incentives while also protecting public safety?

One point we make in the report is that many incentive structures push law enforcement officials to prioritize enforcement activities that bring in the most money to local government — often minor traffic, civil, or criminal violations — as opposed to those that affect public safety the most, such as homicide. This distorts how police allocate their resources, resulting in too little attention spent solving complex, less financially rewarding crimes, and too much toward those that help their budget.

By removing some of the arbitrary, fiscally driven goals that are put upon police, courts, and other justice system officials, we can free up resources to deal with more serious crimes that truly threaten public safety. →

A RIGHT TO CONCEAL AND CARRY?

An upcoming Supreme Court case could vastly expand the number of Americans carrying concealed weapons.

This Supreme Court term, the justices will rule on one of the most important gun cases in the high court's history. The case addresses whether gun owners have a constitutional right to carry their arms outside their homes and, if so, whether restrictive concealed-carry licensing laws violate the Second Amendment. Law professor and Brennan Center Fellow Eric Ruben, a Second Amendment expert, discusses the case and its implications.

A lot of talk in Second Amendment circles currently revolves around one Supreme Court case: *New York State Rifle and Pistol Association v. Bruen*. Tell us about this case.

Bruen involves a New York State law limiting who can carry a concealed handgun in public. For more than a century, New Yorkers wanting a license to carry a concealed handgun for self-defense have needed to show that they have what the law calls "proper cause"—basically a greater need for self-protection than others in the community. A judge determined that the plaintiffs in *Bruen* did not satisfy that standard. They both received concealed-carry licenses, but they were restricted in terms of where they could carry

their handguns. For example, one plaintiff was issued a license to carry a concealed handgun while traveling to and from work, and both plaintiffs' licenses permitted them to carry concealed handguns for hunting, target practice, and in certain areas not frequented by the general public.

Along with the National Rifle Association's New York affiliate, the plaintiffs sued, contending that the limitations placed on their licenses violate the Second Amendment. They argue that the Second Amendment protects their right to carry a handgun virtually whenever and wherever the need for self-defense might arise.

What makes *Bruen* different from previous Supreme Court cases, particularly the landmark decision in *District of Columbia v. Heller* in 2008?

In *Heller*, a bare majority of the justices struck down Washington, DC's ban on handguns in the home. The Supreme Court held, for the first time in more than 200 years, that the Second Amendment protects an individual's right to keep and bear arms centered not around a well-regulated militia, but rather around the inherent right of self-defense.

Heller was a landmark case, constitutionalizing a vast policy area — the regulation of weapons. That said, the law at issue was an outlier because only two major cities in the country, DC and Chicago, had such a handgun ban.

The law challenged in *Bruen*, in contrast, affects a lot more people than the handgun ban at issue in *Heller*. New York is one of eight heavily populated states requiring that people seeking to carry a concealed handgun have a heightened need to do so. If the high court strikes down New York's law, it will have immediate implications in these states — home to roughly one-quarter of Americans.

Moreover, the impact on people in these states will



“If the Supreme Court rules that proper-cause laws are unconstitutional, residents of these eight states can expect to interact with people armed with a deadly weapon.”

Eric Ruben
Fellow

be more significant. *Heller* ruled on the right to have a gun in one's own home. If the Supreme Court rules that proper-cause laws are unconstitutional, residents of these eight states can expect to interact with people armed with a deadly weapon. Gun rights advocates say that is a good thing for society — that an armed society is a polite society — but others, along with the weight of scholarship, suggest otherwise.

What are some possible outcomes of this case?

The Supreme Court could uphold New York's law, but after oral arguments many court watchers think that is unlikely. The Court could also strike down the challenged aspect of the law, the proper cause requirement, which would keep in place licensing but remove most of its teeth. Another possibility is a middle-ground ruling. For example, at oral argument, the plaintiffs' attorney said that his clients had no intention of going into New York City with their handguns. The justices could use that concession to limit their ruling to nonurban places.

A big question is whether the Court uses this opportunity to announce new Second Amendment doctrine, such as a judicial test deeming modern gun violence irrelevant — and history and tradition paramount. That would be highly consequential because it would affect the Second Amendment analysis of *all* challenged weapons laws, not just good-cause restrictions.

One narrative circulating is that the Second Amendment is being treated as a “second-class right” by courts. Does the case law support that narrative?

The “second-class right” trope has become increasingly common in some circles. But in a recent study, Joseph Blocher and I found no strong empirical support for the allegation of widespread mistreatment of gun rights in the courts. Among other things, the success rate of Second Amendment claims is consistent with that in other constitutional contexts.

But the contention of second-class treatment, which has an unmistakably partisan cast in court

opinions, could nonetheless have a profound impact. If a majority of the justices come to accept the second-class claim, that could rationalize a decision to bolster judicial scrutiny of gun laws and further limit the ability of governments to regulate in this area.

If the Court strikes down New York's law, how can federal, state, or local policymakers and voters balance the right to bear arms with public safety concerns?

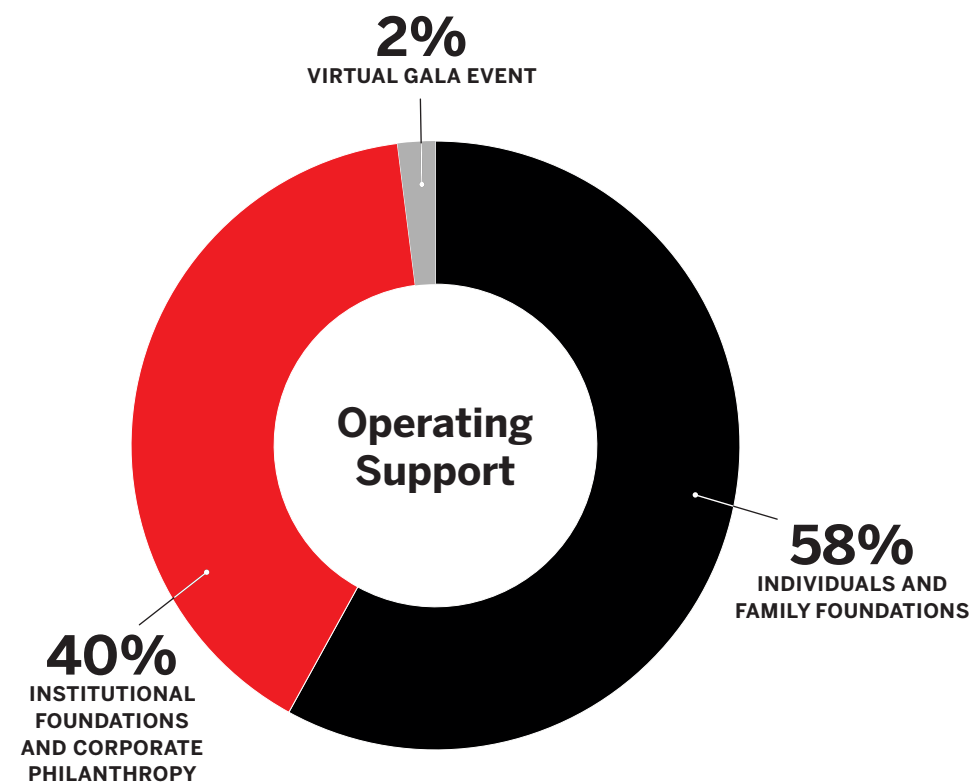
Policymakers will probably adapt to the changed circumstances and seek out alternative routes for regulation. I'm researching how criminal laws governing gun use, as opposed to gun carrying, provide incentives and disincentives for public carry through mechanisms like sentence enhancements, self-defense elements, burdens of proof, and legal inferences. If the Supreme Court strikes down New York's proper-cause requirement, one avenue for regulation might be blocked, but that would merely redirect policymakers down other avenues. ■

FINANCIALS

Our diverse and growing base of supporters — 25,000 strong — stepped up with extraordinary generosity in our fiscal year that began in July 2020.

The year spanned an election threatened by the pandemic and unprecedented efforts to overturn the results. In response, our supporters contributed funds totaling more than ever before in our 25+ year history.

We are deeply grateful to this community.



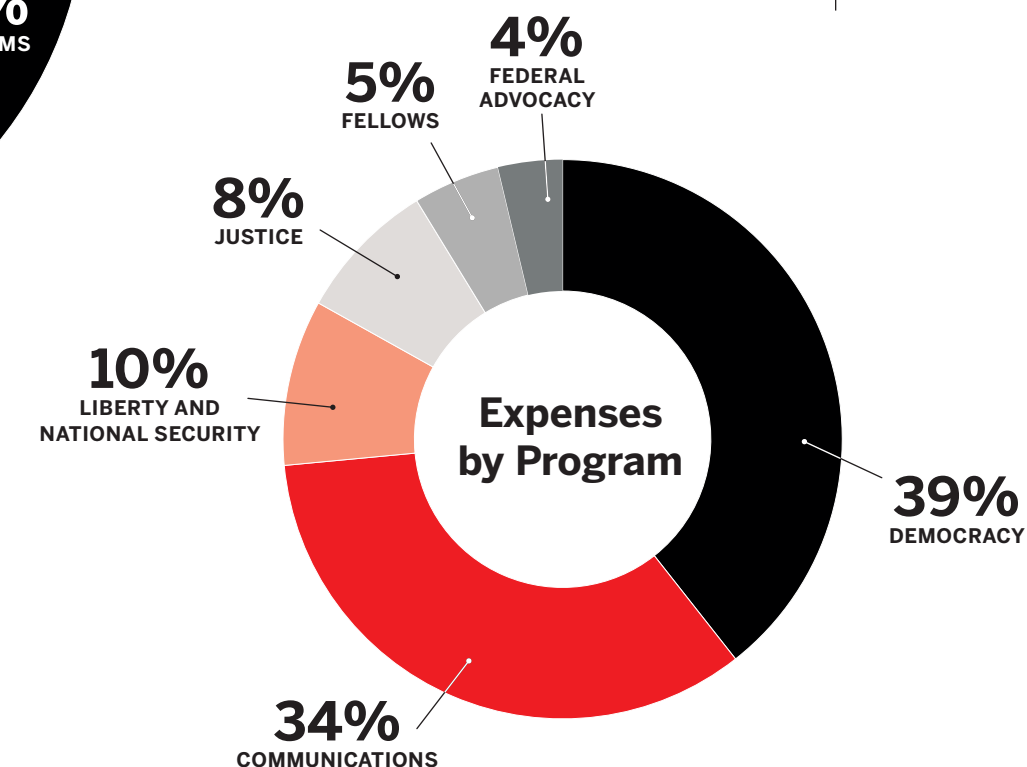
Individuals and Family Foundations	\$28,788,952
Institutional Foundations and Corporate Philanthropy	\$19,525,449
Virtual Gala Event	\$853,851
Total Operating Revenue*	\$49,168,252

*These revenues include the full amount of multi-year awards, including \$11 million in funds meant to be used in upcoming years. This brings actual revenues available for use in Fiscal Year 2021 to just over \$38 million.

The Brennan Center is grateful for the pro bono support provided by the law firm community (see page 59); the monetary value of those services is not included in this chart.



Programs	\$22,784,731
Management & Administration	\$4,709,711
Fundraising	\$3,434,805
Total	\$30,929,247



Democracy	\$8,974,215
Communications	\$7,773,669
Liberty and National Security	\$2,186,190
Justice	\$1,859,912
Fellows	\$1,143,471
Federal Advocacy	\$847,274
Total	\$22,784,731

SPECIAL FUNDS

The Brennan Center’s urgent work garnered special support to ensure a solid, sustainable future for our organization. We now have three initiatives designed to keep us strong for decades to come.

BRENNAN LEGACY FUND

For the first time in our 25+ year history, we have meaningful reserves that ensure our organizational strength and longer-term sustainability. Special support in 2020 and 2021 enabled us to grow our Brennan Legacy Fund, which operates as a quasi-endowment, to \$100 million. This fund is meant to remain intact to ensure our longevity; we must still raise most of our operating budget every year to remain solvent into the future. But it provides an important safety net in case of emergencies, such as a severe economic downturn that significantly cuts our annual fundraising or sudden unbudgeted expenses.

BRENNAN FUTURE FUND

This \$25,000,000 time-limited fund is intended to spur bold new thinking to advance democracy and justice in America.

INEZ MILHOLLAND ENDOWMENT FOR DEMOCRACY

Inez Milholland (1886–1916) was a leader for women’s suffrage, an ardent fighter for equality, and a graduate of NYU Law. The investment income from this \$2,500,000 dedicated fund supports the Brennan Center’s Democracy Program.



BRENNAN LEGACY CIRCLE

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