

SECTION 8 *of* WHAT DEMOCRACY LOOKS LIKE

Improving Our Democracy

All three branches of government: the executive, the legislative, and the judiciary, face a legitimacy crisis that imperils ethical and responsible government. Fully restoring our democracy will require structural reforms to ensure that our government works better on behalf of the American people. Most of this report is focused on the detailed work of improving specific components of our ethics and transparency laws and of reforming institutions so that they can hold government officials accountable. Those fixes are important, but they are insufficient. In this section, we address some of the most critical issues threatening our democracy.

Addressing those issues begins with affirmatively guaranteeing the right to vote and passing federal legislation to ensure that every American's ability to exercise that right is a reality. Tragically, our democracy has never engaged in a comprehensive and sustained effort to do so. Instead, the powers of our state and federal governments have been wielded to prevent massive portions of the populace from voting, including, at various points in our history: men without property, women, slaves, former slaves, indigenous peoples, Black Americans, individuals convicted of felonies, and others. A government that cannot guarantee to its citizens the equal right to elect public officials is not a democracy.

We must also revisit the ways in which our jurisdictional boundaries and election rules subvert voters' choices. Our mechanisms for electing senators and a president are becoming increasingly undemocratic because a smaller and smaller percentage of voters are capable of controlling each. And partisan redistricting of congressional districts in many states has allowed parties to control a disproportionate number of seats to the votes they have earned. Some of those structural choices reflect outdated compromises from our nation's founding. Others reflect different compromises—such as ensuring that there were insufficient votes in the Senate to outlaw slavery for the first eighty years of our republic.

The power imbalances ingrained in the presidency and U.S. Senate have, by extension, threatened the legitimacy of the Supreme Court of the United States. A majority of justices on the Supreme Court have been appointed by Republican presidents for the last 50 years. That

statistic is remarkable given that Democratic candidates for president won the popular vote in seven of the last eight elections. Over the last three decades, there has also been a complete breakdown in the norms that used to govern the Senate's consideration of Supreme Court nominees.

Finally, the Supreme Court has taken its own affirmative steps to undermine the legitimacy of our government. The Court has increased the role and influence of money in our politics by placing severe restrictions on Congress's ability to impose sensible limits on the amount that candidates, campaigns, individuals, and corporations can spend to influence the outcome of our elections. The Court has also severely undermined efforts to police and prosecute public corruption by overturning the convictions of members of Congress, governors, and other elected officials—whose wealthy donors benefited enormously from special access or treatment. These decisions, ostensibly grounded in the First Amendment, have contributed to the perception that campaign donations and election expenditures—not votes—are the key to influencing elected officials.

Issue 1: Disenfranchised Americans

A citizen's right to vote is the bedrock of any representative democracy; it is the basis for our government's legitimacy. Our leaders compete to win the support of citizens and then translate voters' preferences into policy.

That is the theory anyway. But the United States has never guaranteed its citizens the right to vote. Even after hard-fought victories to extend the franchise to former slaves, people of color, women, and all persons 18-or-older, serious impediments to voting persist. In many cases, these roadblocks reflect intentional efforts by those in power to disenfranchise portions of the electorate unlikely to support their continued dominance.

Deliberate efforts to disenfranchise voters were bolstered by the Supreme Court's decision in *Shelby County v. Holder* to invalidate key provisions of the Voting Rights Act of 1965. That legislation, which was reauthorized by Congress for five decades, required jurisdictions with a history of voter suppression and low voter registration or turnout to seek approval from the Department of Justice before changing their voting laws. The Brennan Center [estimates](#) that approximately two million voters would not have been purged from voter registration rolls between 2012 and 2016 if the preclearance provisions of the Voting Rights Act were still in effect.

In many jurisdictions, restrictions on voting are justified as efforts to combat voter fraud, but in reality, voter fraud is [vanishingly rare](#). Unfounded concerns about voter fraud are nevertheless used to enact laws and policies that disenfranchise voters without improving the security of elections or the veracity of election results.

In addition, entire segments of the United States continue to be denied the franchise by states and the federal government. Citizens who reside in the District of Columbia are entitled to vote for president under the Twenty-Third Amendment, but they do not have voting representation in Congress. Citizens of Puerto Rico, Guam, the U.S. Virgin Islands, and other federal territories cannot vote for the president or members of Congress.

In many states, citizens convicted of a felony are prohibited from voting or face enormous obstacles to restoring their voting rights. The efforts to disenfranchise this class of voters, who are disproportionately Black and Latino, are staggeringly cynical. In Florida, for instance, voters overwhelmingly [approved](#) a state ballot [initiative](#) amending the state Constitution to "automatically restore the right to vote for people with prior felony convictions, except those convicted of murder or a felony sexual offense, upon completion of their sentences, including prison, parole, and probation." After the initiative passed, the Republican controlled legislature enacted a new law requiring the formerly incarcerated to complete "all terms of sentence" including full payment of restitution, or any fines, fees, or costs resulting from the conviction, before they could regain the right to vote. Despite the amendment to Florida's state constitution, as of a month before the 2020 election, [fewer than 8 percent of state citizens](#) convicted of a felony had registered to vote since the constitutional amendment passed.

Potential Solutions

- **Enact federal legislation securing every American’s right to vote.** Comprehensive voting legislation could include:

Uniform standards for state voter registration, including online registration systems, longer periods for voter registration, same-day registration, and automatic voter registration;

Criminal penalties for interfering with an individual’s voter registration;

Prohibitions on deceptive practices aimed at discouraging voting or suppressing voter registration;

Banning the disenfranchisement of citizens convicted of a felony;

Prohibiting states from imposing any costs on a voter, including the costs of mailing a ballot or the payment of any form of fine, restitution, or back tax; and

Requiring states to offer vote by mail to eligible voters without additional conditions or requirements except for signature verification.

- **Renew federal voting rights protections.** Congress could reestablish and bolster federal voting rights protections by:

Establishing new criteria for determining which states and political subdivisions must obtain preclearance before changes to voting practices in these areas may take effect;

Requiring all jurisdictions to preclear changes to documentation requirements or registering to vote by mail; and

Specifying what practices will require preclearance, including changes to methods of election, changes to jurisdiction boundaries, redistricting, changes to voting locations and opportunities, and changes to voter registration list maintenance.

Expand the congressional representation of citizens of the District of Columbia and Puerto Rico.

Congress could admit the District of Columbia as a state. The District of Columbia is [home](#) to more than 700,000 Americans that include fire fighters, teachers, small business owners, and veterans. That’s more people than the states of Wyoming and Vermont, almost as much as Alaska. The District of Columbia has completed the steps typically required of prospective states, including passing a [referendum](#) supporting statehood and drafting a state [Constitution](#).

Congress could separately establish a process and timeline for Puerto Rico to consider becoming a state. Puerto Ricans [voted](#) to support statehood in 2020.

- **Consider a constitutional amendment to permit the territories to vote for president and enjoy congressional representation.** Under the Twenty-Third Amendment, citizens of the District of Columbia have been afforded the right to vote in presidential elections. Congress could consider a constitutional amendment to allow all citizens who reside in federal territories to vote in federal elections.

Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1 (116th Congress, 2019).

Rep. Norton's [Washington, D.C. Admission Act](#), H.R. 51 (116th Congress, 2019).

Rep. Serrano's [Puerto Rico Statehood Admission Act](#), H.R. 4901 (116th Congress, 2019).

Sen. Leahy and Rep. Sewell's [John Lewis Voting Rights Advancement Act](#), S. 4263 (116th Congress, 2020).

Amber L. Cottle, [Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections](#), *University of Chicago Legal Forum*, 1995.

Neil Weare, [Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia](#), *46 Stetson Law Review* 1, February 2, 2017.

Issue 2: Undemocratic elections

Another threat to our government’s legitimacy is the fact that federal elections are producing increasingly anti-majoritarian results. Those results are the product of outdated rules and institutions like the electoral college, which were not designed in anticipation of the advent of political parties—not to mention the enormous demographic and social changes that have occurred over the last 240 years. In some cases, these results are intended, such as the admission of slave states to ensure that the Senate would not have the votes to end slavery, or the gerrymandering of House districts to maximize the chances that one party will win. In other cases, they reflect the ideological [sorting](#) of Americans between rural and urban jurisdictions.

Twice in the last twenty years, the presidential candidate who won the support of the most Americans did not win the most electoral votes and, therefore, the election. Even though such events have been unusual in our history, we should not expect them to be rare in the future. One study [showed](#) that a presidential candidate of one political party can expect to win the electoral college even if they lose the popular vote by six percentage points.

Nor does the electoral college secure the benefits that are sometimes attributed to it. The electoral college does not produce an incentive for candidates to campaign in smaller states; rather, it provides an [incentive](#) for candidates to campaign in competitive larger states. Indeed, in 2020, campaign visits and spending by both President Donald Trump and President-Elect Joe Biden were [focused on](#) a relatively small number of states.

And the Senate is becoming even more anti-majoritarian. Estimates indicate that by 2040, about 70 percent of Americans will live in 16 states. This means that the remaining 30 percent of Americans, spread across 34 states, will [control](#) 68 percent of Senate seats. As a result, individuals in less populous states, who are overwhelmingly white, [will have dramatically more](#) power to influence Congress than those in more diverse populous states.

The problem is compounded by systemic, intentional efforts in many states to establish House district boundaries that give one party an unfair advantage. This “gerrymandering” has led to misrepresentation—a mismatch between votes won and seats won—in the composition of many states’ congressional representation. This misrepresentation can be dramatic. In 2016, Republicans [earned](#) 1.2 percentage points more votes than Democrats; however, they ended up with 10.8 percent more seats than Democrats. A significant portion of this over-representation can be attributed to partisan gerrymandering. According to a [study](#) by the Center for American Progress, gerrymandering shifted an average of 19 seats per election from Democrats to Republicans between 2012 and 2016. A 2017 Brennan Center [report](#) pegged the advantage at 16-17 seats.

During the Trump Administration a new, insidious effort to skew both congressional apportionment and the electoral college has emerged. The Administration has repeatedly interfered with the decennial census, first by trying to add a citizenship question that “[could cause the census to miss millions of Hispanics](#)” and seems explicitly aimed at [reducing](#) their response rates. After that effort failed, President Trump [issued](#) a presidential memorandum calling for the exclusion of unauthorized immigrants from the census counts used to apportion congressional seats. It is unclear whether this effort will succeed, for the [Fourteenth](#)

[Amendment](#) requires that congressional representatives “be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.”

In addition, several states have election rules that discourage majoritarian results. Many southern states continue to require the top two candidates to participate in a runoff election after the general election if no candidate receives at least 50 percent of the vote. Such rules, a [legacy](#) of the Jim Crow era, are common in the South and were put in place as part of an effort to prevent Black communities which represented a sizable minority of the population from electing the candidate of their choice. Such rules might appear majoritarian on their face, but in reality, they present an obstacle to every citizen’s preference being counted because they require citizens to vote a second time, and [many do not](#). In other states such as Maine (prior to its adoption of instant-runoff voting in 2018) and Alaska, the prevalence of independent candidates has produced races in which candidates win office with soft, plurality support.

The structure of many state primary elections may [encourage](#) polarization. Partisan primaries contribute to polarization because they force candidates to appeal to primary voters who are more ideologically extreme than the electorate as a whole. In many [states](#), participation in a primary is limited to registered party members. In other [states](#), unaffiliated voters can only vote in one party’s primary. As a result, many general elections feature candidates who, having emerged from partisan primaries, are not well-placed to represent the true preferences of the full electorate. This problem is particularly acute in jurisdictions where the general election is not competitive because the winner of one of the partisan primaries is heavily favored to win.

These structural features of our democracy are not immovable objects. We have changed key features of federal elections when our system has been exposed as flawed or illegitimate. We enacted constitutional amendments to fix the electoral college after the disputed election of 1800; we twice amended the apportionment of members to the House of Representatives—once to fix the number of members, and once to require that they be apportioned on the basis of whole persons not “three fifths;” we provided for the direct election of senators, discontinuing the practice of state legislatures choosing them; and we gave the District of Columbia the right to vote in presidential elections.

Potential Solutions

- **States could assign electors based on the national popular vote by joining the [National Popular Vote Compact](#).** That compact provides that if enacted in states comprising 270 electoral votes, each state would allocate its electoral votes to the winner of the national popular vote. This change would prevent a candidate from winning the electoral college without winning the popular vote.
- **States could adopt open, top-two primaries to reduce partisan polarization.** In a top-two primary system, the top-two vote getters in the primary advance to the general election, regardless of which—if any—party they belong to. Evidence [suggests](#) that after California, Louisiana, and Washington adopted top-two primary systems, federal representatives elected in each state displayed less extreme voting behavior. In California, state representatives also [became](#) less ideologically extreme after adoption of two-party primaries.
- **States could create independent redistricting commissions to draw nonpartisan**

House districts. One way to ensure that redistricting is based on fair, neutral criteria is to empower an independent body to perform that task. To the extent that states fail to do so, Congress could consider banning consideration of partisanship or ideology in redistricting.

- **States could adopt instant-runoff elections (ranked-choice voting).** Instant runoff elections prevent voters from being disenfranchised by having to return to the polls if the top two candidates do not get 50 percent of the vote. Ranked-choice voting helps ensure that a candidate cannot claim victory with a small plurality while at the same time encouraging third party candidacies. By reallocating the votes of the lowest-placing candidates and counting those voters' lower-ranked choices, ranked-choice voting is one powerful way to encourage a diversity of choices in a first-past-the-post election.
- **Congress could rebuff President Donald Trump's attempts to interfere with the census and ensure it is protected from future interference.** Congress could reject census results that have been unconstitutionally manipulated by President Trump. In addition, Congress could explore ways to prevent future political interference with the census, such as insulating the Census Bureau from the influence of the president and treasury secretary.

Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 2400 et seq. (116th Congress, 2019).

Rep. Beyer's [Fair Representation Act](#), H.R. 4000 (116th Congress, 2019).

Rep. Raskin's [Ranked Choice Voting Act](#), H.R. 4464 (116th Congress, 2019).

Sen. Menendez's [Every Person Counts Act](#), S. 201 (116th Congress, 2019).

Sen. Klobuchar and Rep. Lofgren's [Redistricting Reform Act of 2019](#), S. 2226 (116th Congress, 2019).

Sen. Merkley's [A joint resolution proposing an amendment to the Constitution of the United States to abolish the electoral college and to provide for the direct election of the President and Vice President of the United States.](#), S.J.Res. 16 (116th Congress, 2019).

Yurij Rudensky and Annie Lo, [A Better Way to Draw Districts](#), *Brennan Center for Justice*, December 12, 2019.

[The National Popular Vote Compact Bill](#), *National Popular Vote!*, 2020.

Issue 3: The judiciary's legitimacy crisis

The legitimacy of the Supreme Court is being threatened by the collapse of norms that govern Supreme Court nominations. In the last decade, the process has broken down completely and become an exercise in naked political power—largely to the advantage of the conservative legal movement.

In 2016, the Republican-controlled Senate [refused to consider](#) the nomination of Merrick Garland to fill the vacancy created by the passing of Supreme Court Justice Antonin Scalia in the last year of Barack Obama's presidency. Republican senators asserted that the American people should have a chance to decide who should pick the next Supreme Court justice.

President Donald Trump was elected in 2016 despite losing the popular vote by nearly 3 million votes. During the consideration of President Trump's eventual nominee for the same seat, the Republican-controlled Senate [eliminated](#) the filibuster for Supreme Court justices (a step that the Democratic-controlled Senate [had taken](#) for lower court judges in 2013). Now, in 2020, the Republican-controlled Senate ignored the rule it had established to deny Merrick Garland consideration and [confirmed](#) Amy Barrett to fill a vacancy created less than 60 days before the 2020 election. Supreme Court Justices Neil Gorsuch, Brett Kavanaugh, and Amy Barrett [were](#) the first three justices in American history nominated by a president who had not won the popular vote and confirmed by a Senate coalition representing a minority of Americans. Supreme Court Justices Clarence Thomas and Samuel Alito were also confirmed by Senate coalitions [representing](#) a minority of Americans.

The consequences for many of the reforms discussed in this report could be profound. At all times since 1970, a majority of the justices on the Court have been appointed by Republican presidents, and the result has been a dramatic shift in the law. By advancing extreme views of executive power and the First Amendment while consistently undermining Congress's power to conduct oversight and legislate, the Court has issued decisions that threaten our constitutional order.

The hard question is how to reestablish a stable paradigm that both parties can support moving forward. The Supreme Court is an integral institution for our democracy, and its legitimacy will continue to be in peril if it continues to reflect structural power imbalances in our Constitution and is subjected to further partisan efforts to shape its composition. Simply adding seats to restore ideological balance to the Court—as some have [proposed](#)—may not solve the problem because it could lead to a reciprocal expansion of the Court by the other party in the future. We need a proposal that lowers the stakes for both sides and that is sustainable in the long run.

Another significant consideration is the fact that the Constitution also establishes certain parameters with which any reform must be compatible. [Article III](#) states that federal judges shall hold their offices in good behavior, which means that justices are entitled to serve on the Court until they resign, pass away, or are impeached and convicted. Article III does not require Congress to create a Supreme Court with a particular number of justices; however, it does state that “[t]he judicial Power of the United States, shall be vested in one supreme Court.”

Expanding the Court could have benefits beyond addressing the Court's legitimacy. A larger Court might prove less consistently divided along ideological lines and thereby reduce public

perception that the Court is purely an extension of partisan politics. A larger Court could reduce the consequences of a death or resignation, and perhaps even encourage more justices to retire earlier rather than waiting until their health fails them. It could also expand the Court's capacity to hear more cases, since there would be more judges to craft opinions and decide them.

Adding more justices could help the Supreme Court be a better reflection of the country. In its entire history, the Court has had 114 justices. Only five have been women, and only two have been Black. It is past time we had a diverse group of individuals on our highest court.

Potential Solutions

- **Congress could pass legislation expanding the size of the Supreme Court by a specific number of seats or by providing that every president shall nominate one justice to the Supreme Court during each Congress.** Granting every president the opportunity to nominate a new justice every two years (once in each Congress) and allowing the size of the Court to fluctuate could fix many of the Court's ills. Establishing regularity to Supreme Court nominations would reduce the incentives for brinkmanship by partisans in the Senate. This solution can also be enacted without a constitutional amendment because it does not impose term limits on any justice, require use of rotating panels of justices, or require a justice to serve on a different court after a certain number of years.
- **Congress could consider proposing a constitutional amendment imposing term limits for all Article III judges and justices.** Term limits very likely require constitutional, not merely legislative change. Nonetheless, proposing a constitutional amendment setting lengthy term limits for federal judges and justices could help ensure that individuals leave the bench while they are still in good health. Congress has established long but fixed terms for certain Article I judges, including [magistrate](#), [bankruptcy](#), and [tax court](#) judges.

Resources

Rep. Khanna's [Supreme Court Term Limits and Regular Appointments Act of 2020](#), (116th Congress, 2020).

John M. Lawlor, [Court Packing Revisited: A Proposal For Rationalizing The Timing Of Appointments To The Supreme Court](#), 134 *University of Pennsylvania Law Review* 967, 1986.

Steven G. Calabresi and James Lindgren, [Term Limits for the Supreme Court: Life Tenure Reconsidered](#), 29 *Harvard Journal of Law and Public Policy* 3, April 7, 2005.

Issue 4: The invalidation of laws targeting public corruption

Over the last five decades, the Supreme Court has done immeasurable damage to Congress's ability to combat public corruption. Relying on an ahistorical, maximalist interpretation of the First Amendment, the Court has invalidated common-sense bipartisan efforts to limit the role of money in politics. The damage inflicted by the Court is not limited to the specific statutory schemes it has overturned. By relying on constitutional considerations—including the First Amendment and principles of federalism—the Court has completely removed many of the most effective policy solutions from the table.

Over the last 50 years, bipartisan coalitions of Congress have enacted federal campaign finance restrictions that would have placed fair and sensible restrictions on the role of money in our elections. Modern campaign finance law took shape in the years before and after the Watergate scandal. The Federal Election Campaign Act of 1971 (FECA) regulated political campaign spending and fundraising by establishing a comprehensive system for disclosing contributions to federal political campaigns. After extensive misconduct in President Richard Nixon's 1972 reelection campaign, Congress amended the FECA by establishing limits on contributions by individuals, political parties and political action committees and by establishing the Federal Election Commission—an independent agency—to monitor campaign disclosures and enforce the FECA. The Court responded immediately in *Buckley v. Valeo* (1976) by invalidating the FECA's restrictions on candidate contributions to a campaign and independent expenditures.

In 2002, Congress again passed bipartisan campaign finance reform. The [Bipartisan Campaign Reform Act of 2002](#) (BCRA) (frequently referred to as McCain-Feingold) amended the FECA by, among other things, banning committees and candidates from raising non-federal funds (i.e. “soft money”); limiting and requiring the disclosure of campaign ads (termed “electioneering communications”); strengthening limits on coordinated outside spending; and increasing contribution limits for candidates facing an opponent who uses personal funds for large campaign expenditures.

The BCRA faced court challenges immediately, and although the Supreme Court upheld parts of the law, it struck down several of the BCRA's most important elements. In *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007), the Court invalidated the ban on corporate-funded electioneering communications within sixty days of an election, opening the door to ads masquerading as non-political communications that stop short of endorsing or opposing a candidate but are nonetheless intended to impact an election. In *Davis v. Federal Election Commission* (2008), the Court invalidated a provision that raised the contribution limits for individuals running against candidates who infuse their campaigns with personal funds. And in *Citizens United v. Federal Election Commission* (2010), the Court invalidated limits on independent corporate expenditures. In all three cases, the Court split 5-4 along ideological lines.

In the wake of these decisions, there has been a massive increase in spending on federal elections. In the decade prior to *Citizens United*, outside individuals and groups (excluding parties) spent \$296 million on independent expenditures. In the decade following that decision, spending on independent expenditures experienced a [14-fold increase](#). In the 2020 election cycle alone, outside individuals and groups have already spent nearly [\\$2.6 billion](#) on independent expenditures.

The Court has done similar damage to laws Congress enacted to deter and punish public corruption by narrowing into oblivion criminal prohibitions on gratuities, bribery, honest services fraud, and extortion. The Court's decisions have eviscerated the ability of prosecutors to charge public officials for misconduct that is not an explicit exchange of money or some other thing of value for an extremely limited set of official acts.

In *United States v. Sun-Diamond Growers of California* (1999), the Supreme Court erased the distinction between two public-corruption crimes: bribery and gratuities. Congress had seen fit to criminalize conduct beyond an explicitly corrupt exchange (bribery), and therefore made it a crime to give a public official (or for the public official to accept) a thing of value because of an official act, but not necessarily in order to influence the official to act in a certain way. In *Sun-Diamond Growers of California*, the Court held that even when charging the lesser crime of gratuity, prosecutors had to establish a *quid pro quo*—much as they would in a bribery case.

Prosecutors then sought to charge similar conduct as honest services fraud under the theory that public officials who seek or demand payments are depriving their victims—the public—of their honest services. But in *Skilling v. United States* (2009), the Court struck down this approach as well by holding that honest services fraud also could not be charged unless it involved a bribe or a kickback.

In *McDonnell v. United States* (2016), the Court narrowed the scope of the federal bribery law and interpreted it to apply only to a narrow category of official actions that a public official might take in exchange for a bribe. In the Court's view, charging a fee for a meeting or for setting up meetings with other public officials was insufficient to support a bribery conviction. The Court relied in part on concerns that penalizing politicians from arranging meetings for donors might interfere with “the basic compact underlying representative government” which is “that public officials will hear from their constituents and act appropriately on their concerns” The Court also referenced concerns that federal prosecution of state officials on bribery charges raised federalism issues.

Finally, in *Kelly v. United States* (2020), the Court overturned federal-program fraud and wire fraud convictions for two individuals who closed lanes on the George Washington Bridge to divert traffic to Fort Lee, New Jersey because the town's mayor had chosen not to support Chris Christie in the 2013 New Jersey gubernatorial election. The Court held that the corruption statutes charged were “limited in scope to the protection of property rights” and that since the object of defendants' fraud was not money or property but rather political retribution, their convictions could not be sustained.

From *Buckley* to *Citizens United*, and from *Skilling* to *Kelly*, the Supreme Court has sided with corruption over democracy. Congress needs to reassert its authority to ensure that our elections reflect the will of the people and to ensure that influence of those elected cannot be purchased.

Potential Solutions

- **Congress could seek to ratify a constitutional amendment reestablishing its authority to combat corruption.** Congress needs to reassert its power to set reasonable limits on contributions and expenditures in federal elections and to regulate bribery and other forms of corruption involving elected officials in federal, state, and local government. The amendment could clarify that notwithstanding the Supreme Court's decisions in *Buckley* and its progeny, Congress has the authority to regulate political

expenditures and contributions, including by establishing limits on both or by banning electioneering by corporations. The amendment could also affirmatively give Congress the power to combat public corruption, including by establishing laws with civil and criminal penalties for misconduct associated with public office, including bribery, gratuity, extortion, and fraud.

- **Congress could bolster the public corruption laws that the Court has weakened.** This could be achieved by:

Expanding the definition of the term “official act” in the bribery and gratuity statutes to deter public officials from accepting bribes or gifts for a wider range of actions that could influence public policy;

Defining the crime of gratuity to include gifts given because of the office that the recipient occupies or will occupy, not merely an official act; and

Establishing a new crime of honest services fraud that involves undisclosed self-dealing or the misuse of government resources for a corrupt purpose.

Resources

Rep. Sensenbrenner’s [Clean Up Government Act of 2011](#), H.R. 2572 (112th Congress, 2011).

Sen. Leahy’s [Public Corruption Prosecution Improvements Act](#), S. 401 (112th Congress, 2011).

Rep. Suozzi’s [Close Official Acts Loophole Act of 2017](#), H.R. 3843 (115th Congress, 2017).

Jennifer Ahearn, [A Way Forward for Congress on Bribery after McDonnell](#), *121 Penn. St. L. Rev.* 1013, 2016-2017.

Jennifer Ahearn and Noah Bookbinder, [“Paralyzing gridlock” in criminal public-corruption law](#), *SCOTUSblog*, September 25, 2019.

Michael A. Foster, [Bribery, Kickbacks, and Self-Dealing: An Overview of Honest Services Fraud and Issues for Congress](#), *Congressional Research Service*, May 18, 2020.