Oath Review and Drafting Task Force

Meeting Agenda
June 15, 2026 – 2:00 – 3:30 p.m.

Virtual only meeting via Zoom:
https://wsba.zoom.us/j/83547108013?pwd=6pPWqbEVGNmNZleaRPKruG8J3pCZwU.1
Meeting ID: 835 4710 8013
Passcode: 318882

1. Call to Order & Opening Ceremonies
2. Reading and Approval of Minutes of May 18, 2026 Meeting
3. Report and Discussion: Memo and First Working Draft of Revised Oath
4. Discussion of Next Steps
5. Open Forum
6. Announcements
7. Adjourn

WASHINGTON STATE
BAR ASSOCIATION

OATH REVIEW AND DRAFTING TASK FORCE
MEETING MINUTES
May 18, 2026

The meeting was held in person and remotely via Zoom.

Members present were Rajeev Majumdar (Chair), Angela Balconi, Hunter Abell, Kyle Sciuchetti, Hon. James Smith, Courtney Hudak, Monte Mills, and Roger Wynne. Also present were Matthew Dresden (WSBA Board of Governors liaison), Steve Crossland (Chair of the Limited License Legal Technician Board), Robert Gottfried (WSBA member), Doug Ende (WSBA Chief Disciplinary Counsel), and Rachel Agent (WSBA Disciplinary Program and Systems Manager).

The Chair called the meeting to order at 2:01 p.m.

1. Agenda Overview and Reading and Approval of Minutes of March 23, 2026 Meeting

The minutes of the March 23, 2026 meeting were approved by unanimous consent.

2. Report: Meeting Materials

Chief Disciplinary Counsel Ende reported on the meeting materials, which included three article citations provided by Task Force members Judge James Smith and Kyle Sciuchetti, as well as the agenda for the 2026 ABA National Conference on Professional Responsibility, which features a program focused on the oath of attorney

3. Guest Speaker: Robert Gottfried

Robert Gottfried, discussed the impetus for writing "The Anatomy of Our Oath to Support the US Constitution," which was designed for law students during Robert's employment at the ABA Center for Professional Responsibility.

4. Report on Interim Presentation to Board of Governors (BOG)

Last month, Chair Majumdar provided an interim report at the BOG meeting with an update on the Task Force's work.

By unanimous consent, the Task Force approved the Chair's proposal to request that the BOG approve an extension beyond the October 31, 2026 Charter deadline for completion of work.

5. Report and Discussion: Data Analyst Survey Results on the attorney and LLLT oath surveys

Chair Majumdar presented the data analysis report on the results of the surveys. Of note, the newer lawyer audience was statistically underrepresented in the survey and a majority of out of state practitioners supported not changing the oath.

6. Reports from Subcommittees

The subcommittees referenced their written materials and discussed their work over the past month.

7. Discussion of Next Steps

The Chair, along with the WSBA staff liaisons, will prepare a preliminary draft of revisions to the lawyer oath reflecting the subcommittees' recommendations.

8. Adjourn

There being no further business, the meeting was adjourned at 3:12 p.m.

FIRST WORKING DRAFT OF A REVISED WASHINGTON STATE OATH

WSBA Oath Review and Revision Task Force

June 5, 2026

A. Overview

By unanimous consent of members present at the May 18, 2026 Task Force meeting, the Chair and Staff Liaison embarked upon preparation of preliminary draft of a revised oath for consideration at the June 15, 2026 meeting. That draft is presented in Section D, below.

B. Materials Considered

The starting point for the draft was the current Oath of Attorney, which consists of eight paragraphs and 272 words. The drafters modified the current oath based on the reports of the Task Force's two subcommittees (see May 18, 2026 Task Force Meeting Materials at 101-07). The drafters engaged in a multi-step process, revising the oath first based on the recommendations of the Subcommittee on Revision of Existing Oath Provisions. That (shorter) iteration of the oath was then supplemented using the suggestions of the Subcommittee on Potential New Oath Provisions, yielding a 10-paragraph oath consisting of 221 words. That interim draft was next refined in a collaborative drafting process between the Chair and the Staff Liaison, taking into consideration data yielded by the Task Force survey, commentary shared in the survey and via direct stakeholder input, suggestions received during the Chair's interim report to the Board of Governors, provisions in use by other U.S. jurisdictions, and a careful reading of the Preamble to the Rules of Professional Conduct, as well as its prologue, the Fundamental Principles of Professional Conduct.

C. Drafting Principles

The collaborative process was guided by a number of drafting principles, including the following:

- The revised oath should not have more provisions (paragraphs) or words than the current oath.
- No paragraph should be more than one sentence.
- On the tenet that the greater includes the lesser, draft at the highest and broadest degree of generality to avoid having to list many specific instances (i.e., every constitution that a lawyer should uphold).
- Focus on universal concepts that will be memorable and that oath-takers ought to be reminded about.

- Use easy-to-say, accessible words whenever possible.
- Keep each paragraph short and easily repeatable out loud (no more than one sentence and, ideally, no more than 25 words per sentence).
- Use the same simple verbs, sentence structure, and diction whenever possible.
- Do not include more than three words or phrases in a series.
- Begin with a beginning; end on a transformative, aspirational note.
- Lean into ideas and phrasings from the Rules of Professional Conduct and its Fundamental Principles/Preamble when synergistic with ideas that ought to be included.
- Do not use words or concepts that most people don't understand.
- Draft an oath usable by lawyers, LLLTs, and LPOs.
- The oath should radiate simple elegance in each part and in the whole.

D. The Working Draft (annotated)

The Working Draft consists of eight paragraphs and 210/214 words (depending on choice of alternatives in paragraph 2), as follows:

1. I take this oath as I become a member of the legal profession in Washington State with a special responsibility for the quality of justice,[1] the education of the public, and the ethical representation of clients.

2. *[Drafters were deadlocked and present paragraphs **a** and **b** as alternatives]*[2]

a. I will uphold by the sovereign Tribal, State, and Federal laws and constitutions and laws where I practice.

b. I will uphold the laws and constitutions of each jurisdiction where I practice law.

3. I will recognize[3] the unique history of the legal profession in Washington State and the role of sovereign tribal nations and their legal systems.

4. I will be bound and will abide by our Rules of Professional Conduct.[4]

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[1] "Special responsibility for the quality of justice" is drawn from the RPC Preamble, paragraph [2].
[2] Both alternatives represent a merger of paragraphs 1 and 2 of the current oath.
[3] The drafters were not comfortable with the verb choice ("recognize") here but struggled to find a better option, concluding that many other verb choices could have negative connotations or were too complex. It is presented as-is for Task Force discussion.
[4] This paragraph is based on paragraph 3 of the current oath.

5. I will maintain the respect due to legal tribunals, obey their orders and rules, and accept their appointments.[5]

6. I will be honest and conduct myself at all times with dignity, courtesy, and integrity.[6]

7. I will support and defend our constitutional democracy, the rule of law, and our justice system.[7]

8. I recognize that legal professionals, as guardians of the law, play a vital role in the preservation of society;[8] I now accept the obligation to ensure meaningful access to justice for all.[9]

[5] This paragraph is based on paragraph 4 of the oath, broadened to legal tribunals generally and supplemented to reference the principle of obedience to court rules, orders, and appointments.
[6] The honesty component blends, at a high level, the "truth and honor/artifice" language in paragraph 5 of the current oath. The dignity, courtesy, and respect is a more contemporary take on the "offensive personalities" clause in the current oath; it is analogous to civility provisions found in the oaths of a number of states and inspired by a suggestion of Professor Lauren Bartlett (see Lauren E. Bartlett, Human Rights and Lawery's Oaths, 36 Georgetown Journal of Legal Ethics 411 (2023).
[7] This paragraph is in part based on the "support the constitution" language in paragraph 2 of the current oath and recognizes the oath-related recommendation of the 2025 Report of the ABA Task Force for American Democracy.
[8] This language is taken from the prefatory "Fundamental Principles of Professional Conduct" in the RPC.
[9] "Access to justice for all" is a contemporary take on the "defenseless or oppressed" language in paragraph 8 of the current oath.

M E M O

TO: Rajeev Mujumdar, Oath Task Force Chair

FROM: Existing Oath Subcommittee
Angie Balconi
Courtney Hudak
Roger Wynne

SUBJECT: Subcommittee report

DATE: May 8, 2026

You asked us to consider the existing oath and report back our thoughts on its provisions. We did this through a shared document where we entered our thoughts. For a fuller picture of our opinions, the substance of that document is attached as an appendix. Although there are eight numbered sections of the existing oath, we considered each sentence separately.

This chart attempts to summarize points of consensus:

1. I am fully subject to the laws of the State of Washington and the laws of the United States and will abide by the same.	Retain, but perhaps simplify and move more to the bottom.
2. I will support the constitution of the State of Washington and the constitution of the United States.	Retain, adding "support *and defend*."
3. I will abide by the Rules of Professional Conduct approved by the Supreme Court of the State of Washington.	Retain in abbreviated form: "I will abide by the Washington State Rules of Professional Conduct."
4. I will maintain the respect due to the courts of justice and judicial officers.	Retain.

5[a]. I will not counsel, or maintain any suit, or proceeding, which shall appear to me to be unjust, or any defense except as I believe to be honestly debatable under the law, unless it is in defense of a person charged with a public offense. 5[b]. I will employ for the purpose of maintaining the causes confided to me only those means consistent with truth and honor. 5[c]. I will never seek to mislead the judge or jury by any artifice or false statement.	Either omit because they are covered by the RPCs or consolidate and rework to be more direct.
6[a] I will maintain the confidence and preserve inviolate the secrets of my client,	Retain the concept; consider rephrasing in light of RPCs.
6[b] and will accept no compensation in connection with the business of my client unless this compensation is from or with the knowledge and approval of the client or with the approval of the court.	Omit.
7[a]. I will abstain from all offensive personalities,	Omit.
7[b]. and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged.	Omit.
8. I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay unjustly the cause of any person.	Replace with something like: "I will advance equal justice under law for all persons."

Please let us know if you have any questions about our input.

Attachment
cc: Rachel Agent
Doug Ende
Hon. Rebecca Glasgow

APPENDIX
Full Subcommittee Comments

1. I am fully subject to the laws of the State of Washington and the laws of the United States and will abide by the same.

Roger	I think I'm a lone voice in thinking this is silly. The first part is stating an obvious legal conclusion: we are all subject to applicable laws. Fine. Do we need to say that? If so, why omit local and other applicable laws we are also "fully subject" to? And do we really mean we will obey all laws? We won't ever speed or cross against a crosswalk signal?
Courtney	I'm with the majority in favor of keeping it. I think particularly in times of legal upheaval, it's worthwhile to start with a declaration of being subject to the law. I think a rewrite could be more elegant though. I'd like to consider options on a rewrite but would be inclined toward something broader. I'd also be inclined to moving this statement to the bottom of the oath rather than having it at the top.
Angie	I am in favor of keeping this or some version of it, I believe it is symbolically important and reinforces that lawyers are not above the law. Although I do agree it is self-evident. Possibly simplifying the statement and I also agree it could be moved closer to the end of the oath.

2. I will support the constitution of the State of Washington and the constitution of the United States.

Roger	I like this. Perhaps add "support *and defend*"?
Courtney	At a recent WSBA CLE, one of the presenters talked about the importance of our legal oath and specifically called out a couple of clauses - this was one of them! I second Roger's suggestion to include *defend* in this section. I like this clause as the first statement of the oath better! Especially updated to read "support and defend."
Angie	I am on the same page with adding 'defend' as it mirrors other public oaths and makes it feel more active rather than passive.

3. I will abide by the Rules of Professional Conduct approved by the Supreme Court of the State of Washington.

Roger	I think we need to keep this, but not sure we need "approved by the Supreme Court of the State of Washington." Too wordy? Maybe this?: "I will abide by the Washington Rules of Professional Conduct."
Courtney	Agree with Roger's suggestion.
Angie	This clause appropriately links to the governing ethical framework and I also agree with Roger on suggested abbreviated language.

4. I will maintain the respect due to the courts of justice and judicial officers.

Roger	I like this.
Courtney	I like this, too.
Angie	This is concise and meaningful; I like it too.

5[a]. I will not counsel, or maintain any suit, or proceeding, which shall appear to me to be unjust, or any defense except as I believe to be honestly debatable under the law, unless it is in defense of a person charged with a public offense.

Roger	I vote to omit this. The RPCs cover this, using slightly different language. This might have made sense when the oath was first drafted, which I think(?) predated the RPCs, but we now have them and the oath can just say we will abide by them.
Courtney	I think 5a-c need reworking. Any rewrites will invite argument and discussion! But at very least they can be written to be more direct. For example: I will act with truth and honor. I will not take up causes that I believe to be unjust. I will tell the truth. I will not mislead judge or jury with artifice (maybe something more plainspoken?) or falsehoods.
Angie	These are interesting (5a-c). I think they can either be removed entirely due to what Roger noted with the RPC's or they could be consolidated into one more modern principal.

5[b]. I will employ for the purpose of maintaining the causes confided to me only those means consistent with truth and honor.

Roger	I'm OK with this. Play nice in the sandbox.
Courtney	See comment above
Angie	See above.

5[c]. I will never seek to mislead the judge or jury by any artifice or false statement.

Roger	Hard to argue against this, but I think 5[b] covers it.
Courtney	See comment above.
Angie	See above.

6[a] I will maintain the confidence and preserve inviolate the secrets of my client,

Roger	See 5[a]. Duplicates the RPCs.
Courtney	I think it's worth stating in some way that we will maintain our clients' confidences. Perhaps a solution would be to move things around slightly, so that we begin with supporting and defending the constitutions, and then go to respecting the courts, and then the statement about the RPCs. Below that statement, we move to statements that may be duplicative of the RPCs, like items 5a-c and at very least, 6a, rewritten to state more directly "I will maintain the confidence of my clients."
Angie	Although I agree this is already covered in the RPC's it is also a defining obligation of the profession, maybe a more simple and powerful version as Courtney noted.

6[b] and will accept no compensation in connection with the business of my client unless this compensation is from or with the knowledge and approval of the client or with the approval of the court.

Roger	See 5[a]. Duplicates the RPCs.
Courtney	I agree that this statement seems unnecessary in the oath.
Angie	Agreed, I feel like this is more regulatory than aspirational and is unnecessary in the oath.

7[a]. I will abstain from all offensive personalities,

Roger	I just find this antiquated and a bit silly.
Courtney	Agree that this can/should be removed.
Angie	The concept of civility remains important, but the phrase "offensive personalities" is antiquated and risks diminishing the seriousness of the oath. I would vote to remove it.

7[b]. and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged.

Roger	I could be convinced to keep this, even though I think it might be a concept covered by the RPCs.
Courtney	I think this, too, could be removed.
Angie	It feels bit redundant; I would vote to either remove it or fold it into a broader integrity/civility statement.

8. I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay unjustly the cause of any person.

Roger	Read literally, this sets a standard we frankly never hold one another to. I would be in favor of something less specific. Perhaps something like: "I will advance the cause of equal access to justice under the law for all."
Courtney	I like Roger's suggestion for a rewrite here.
Angie	Agreed, it sets the standard and I too would be in favor of a modernized version while preserving the character. I like Roger's suggestion and a slightly shorter version could be "I will advance equal justice under law for all persons".

Oath Drafting Task Force

New Language Subcommittee Ideas

1. **Add pledge to *defend* the constitutions of the United States and the State of Washington, as well as *the rule of law***

Possible wording: I pledge/promise to…..support and defend the constitution of the United States, the constitution of the state of Washington, and the rule of law.

2. **Some version of the first value/principle expressed in the RPC preamble**

RPC preamble: "A lawyer, as a member of the legal profession, is a representative of clients, and officer of the court[,] and a public citizen[*] having special responsibility for the quality of justice."

*Note: A person does not have to be a citizen to obtain a WA law license.

Possible wording (building on the prior suggestion): I pledge/promise to…..support and defend the constitution of the United States and the constitution of the state of Washington. I pledge/promise to…..support, defend, and strive to improve the justice system and the rule of law, consistent with my special responsibility for the quality of justice.

3. **Express clear commitment to value diversity of experience**

Possible wording: I pledge/promise to respect and value the diverse perspectives and experiences represented in the legal profession and the people of Washington State.

4. **Make more explicit the duty to accept appointment from courts to represent indigent clients (a more explicit statement of duty contemplated in clause #8).**

Possible wording: I pledge/promise to…..fulfill my duty to accept all court appointments to represent indigent clients.

5. **Add concise pledge to fulfill core values**

Possible wording (like Oregon): To the court, opposing parties, and their counsel, I pledge to act with honesty, integrity, [fairness], and respect in all written and oral communications.

*Note: Articles about civility. González, S. "True Civility Requires More Than Being Polite," *Washington State Bar News* (September 2012), 25-28. (https://wabarnews.org/wp-content/uploads/2021/10/Bar-News-Sept.-2012.pdf page 27 of the pdf)

See also: https://sites.utexas.edu/tjclcr/wp-content/uploads/sites/3748/2025/02/03-Civility-as-Moral-Oppression-pp.-89-129.pdf

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] **[Washington revision]** A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice.

[2] **[Washington revision]** As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer conscientiously and ardently asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] **[Washington revision]** In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] **[Washington revision]** A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a conscientious and ardent advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] **[Washington revision]** In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation conscientiously and ardently to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] **[Washington revision]** The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other legal practitioners. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[Comment [12] amended effective April 14, 2015.]

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may" are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The

Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] **[Washington revision]** For purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client-lawyer relationship is formed. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18 and Washington Comment [11] thereto. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and is a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be

evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Additional Washington Comments (22 – 25)

[22] Nothing in these Rules is intended to change existing Washington law on the use of the Rules of Professional Conduct in a civil action. See Hizey v. Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992).

[23] The structure of these Rules generally parallels the structure of the American Bar Association's Model Rules of Professional Conduct. The exceptions to this approach are Rule 1.15A, which varies substantially from Model Rule 1.15, and Rules 1.15B, 5.8, 5.9, and 5.10, none of which is found in the Model Rules. In other cases, when a provision has been wholly deleted from the counterpart Model Rule, the deletion is signaled by the phrase "Reserved." When a provision has been added, it is generally appended at the end of the Rule or the paragraph in which the variation appears. Whenever the text of a Comment varies materially from the text of its counterpart Comment in the Model Rules, the alteration is signaled by the phrase "Washington revision." Comments that have no counterpart in the Model Rules are compiled at the end of each Comment section under the heading "Additional Washington Comment(s)" and are consecutively numbered. As used herein, the term "former Washington RPC" refers to Washington's Rules of Professional Conduct (adopted effective September 1, 1985, with amendments through September 1, 2003). The term "Model Rule(s)" refers to the American Bar Association's Model Rules of Professional Conduct.

[Comment [23] amended effective April 14, 2015.]

[24] In addition to providing standards governing lawyer conduct in the lawyer's own practice of law, these Rules encompass a lawyer's duties related to individuals who provide legal services under a limited license. A lawyer should remember that these providers also engage in the limited practice of law and are part of the legal profession, albeit with strict limitations on the nature and scope of the legal services they provide. See APR 28; LLLT RPC 1.2.

[Comment [24] adopted effective April 14, 2015.]

[25] Rule 5.9 refers specifically to a lawyer's duties relating to business structures permitted between lawyers and LLLTs. Rule 5.10 refers to a lawyer's responsibilities when working with other legal practitioners operating under a limited license. Other rules have been amended to address a lawyer's relationship with and duties regarding LLLTs. In general, a lawyer should understand the authorized scope of the services provided by LLLTs, including the requirement that an LLLT must refer a client to a lawyer when that client requires services outside of that scope. See LLLT 1.2; APR 28(F). Lawyers should participate in the development of a robust system of cross-referral between lawyers and LLLTs to promote access to justice and the smooth and efficient provision of a complete range of legal services. In addition, a robust system of cross-referral will benefit the profession by supporting LLLTs in operating ethically within their limited licensure. See Preamble Comment [6].

[Comment [25] adopted effective April 14, 2015.]

[Adopted effective September 1, 1985; Amended effective September 1, 2006.]

FUNDAMENTAL PRINCIPLES OF PROFESSIONAL CONDUCT[1]

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. To understand this role, lawyers must comprehend the components of our legal system, and the interplay between the different types of professionals within that system. To fulfill this role lawyers must understand their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation that a lawyer may encounter can be foreseen, but fundamental ethical principles are always present as guidelines. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Rules of Professional Conduct point the way to the aspiring lawyer and provide standards by which to judge the transgressor. Each lawyer must find within their own conscience the touchstone against which to test the extent to which their actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the legal profession and the society that the lawyer serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

[Adopted effective September 1, 1985; Amended effective September 1, 2006; April 14, 2015; January 1, 2023.]

[1] These *Fundamental Principles of the Rules of Professional Conduct* are taken from the former Preamble to the Rules of Professional Conduct as approved and adopted by the Supreme Court in 1985. Washington lawyers and judges have looked to the 1985 Preamble as a statement of our overarching aspiration to faithfully serve the best interests of the public, the legal system, and the efficient administration of justice. The former Preamble is preserved here to inspire lawyers to strive for the highest possible degree of ethical conduct, and these *Fundamental Principles* should inform many of our decisions as lawyers. The *Fundamental Principles* do not, however, alter any of the obligations expressly set forth in the Rules of Professional Conduct, nor are they intended to affect in any way the manner in which the Rules are to be interpreted or applied.

Human Rights and Lawyer's Oaths

Lauren E. Bartlett*

Abstract

Each lawyer in the United States must take an oath to be licensed to practice law. The first time a lawyer takes this oath is usually a momentous occasion in their career, marked by ceremony and celebration. Yet, many lawyer's oaths today are unremarkable and irrelevant to modern law practice at best, and at worst, inappropriate, discriminatory, and obsolete. Drawing on a fifty-state survey of lawyer's oaths in the United States, this Article argues that it is past time to update lawyer's oaths in the United States and suggests drawing on human rights to make lawyer's oaths more accessible and impactful.

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"Updating the lawyer's oath is good for lawyers."[1]

INTRODUCTION

A lawyer's oath is a formal promise to observe the ethical and other obligations of the legal profession.[2] Each lawyer in the United States must swear or affirm a lawyer's oath to be admitted to practice law.[3] The lawyer's oath was, at one time, the principal source for ethical regulation of lawyers.[4] However, today, lawyer's oaths are only sometimes subject to enforcement.[5] In many states, taking a lawyer's oath is merely a rite of passage, part of the ceremony marking the transition to licensed attorney.[6]

The language used in lawyer's oaths varies greatly from state to state. Nearly all, but not all, lawyer's oaths include a pledge to uphold the U.S. Constitution, as well as a pledge to uphold the applicable state constitution.[7] Only fourteen lawyer's oaths reference the rules of professional conduct.[8] A handful of lawyer's

1. Press Release, W. Va. Sup. Ct. App., Supreme Court Announces Addition of Civility Pledge to the Lawyer's Oath (May 17, 2021), http://www.courtswv.gov/public-resources/press/releases/2021-releases/may17b_21.pdf [https://perma.cc/U8WN-C4ZC] (quoting Justice Beth Walker).

2. *See* GEOFFREY HAZARD & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 60 (2004). The terms "lawyer's oath of office," "oath of attorney," and "oath of admission" are used interchangeably by different states to describe the sworn or affirmed statement that a lawyer says upon admission to the bar of each state. *See* Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 4 (2009). For consistency purposes, this article refers to these type of oaths as "lawyer's oaths."

3. *See* Andrews, *supra* note 2, at 5.

4. HAZARD & DONDI, *supra* note 2, at 60; Andrews, *supra* note 2, at 50.

5. Twenty-eight states and Washington, D.C. discipline for violation the lawyer's oath. *See infra* App. A: Lawyer's Oaths Chart (Fifty states and Washington, D.C.). The American Bar Association's Center for Professional Responsibility has compiled a list of state-based professional responsibility resources, including links to state rules of professional responsibility, ethics opinions, and more. *Additional Legal Ethics and Professional Responsibility Resources*, CTR. FOR PRO. RESP., AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest/ [https://perma.cc/5G8S-7UN9] (last visited Mar. 3, 2023). The ABA list does not include links to the state lawyer's oaths.

6. Devon Bombassei, *Child Abuse Disclosure by Lawyers: An "Agency-Capability" Approach*, 14 WASH. U. JURIS. REV. 1, 3, 16 (2021); Andrews, *supra* note 2, at 50 ("In whatever form, the oath continues to have some regulatory and ethical functions but not to the degree that it once had. It no longer serves as the primary statement of ethics standards for lawyers."); HAZARD & DONDI, *supra* note 2, at 60.

7. The Connecticut, Maine, Massachusetts, and New Hampshire lawyer's oaths do not include a pledge to uphold the U.S. Constitution, while all other state lawyer's oaths, including the lawyer's oath for the District of Columbia, do include such a pledge. *See infra* App. A; CONN. GEN. STAT. § 1-25 (2017); ME. STAT. tit. 4, § 806 (2023); MASS. GEN. LAWS ch. 221, § 38 (2022); N.H. REV. STAT. ANN. § 311:6 (2023); *see also* Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When Is It Necessary and Who Should Decide?*, 30 CARDOZO L. REV. 1843, 1844 (2009) (discussing the history of pledges of allegiance in lawyer's oaths and arguing that those pledges underscore that lawyers are agents of the state and federal governments).

8. Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Idaho, Missouri, Montana, Nevada, New Mexico, Ohio, Oregon, Utah, and Washington's lawyer's oaths all include a pledge to uphold the applicable state rules of professional conduct. *See infra* App. A; ALASKA BAR RULES R. 5 § 3 (ALASKA BAR ASS'N 2018); ARIZ. SUP. CT. RULES R. 41(b) (ARIZ. SUP. CT. 2023); ARK. RULES GOVERNING ADMISSION TO THE BAR R. 7 (G) (ARK. SUP. CT. 2017); *Oath of Admission*, COLO. SUP. CT. OFF. OF ATT'Y REGUL. COUNS., https://coloradosupremecourt.com/Current%20Lawyers/Oath.asp [https://perma.cc/BH9T-8HQQ] (last visited Mar. 3, 2023); GA. RULES GOVERNING ADMISSION TO THE PRAC. OF L. pt. B § 16 (GA. SUP. CT. 2022); HAW. SUP.

oaths are very similar, if not identical, to the oaths of office taken by public officials, such as legislators or clerks of court.[9] Some oaths provide no ethical guidance whatsoever.[10] While the language of several states' lawyer's oaths has been updated in the last decade,[11] many still contain archaic terms that have not been in common use for over a hundred years.[12] A few lawyer's oaths refer only to men;[13] and no lawyer's oath in the United States refers to women,[14] mentions anti-racism, or requires a pledge of non-discrimination.[15]

CT. RULES R. 1.5 (HAW. SUP. CT. 2023); IDAHO CODE § 3-201 (2022); MO. ANN. STAT. R. 8.15 (2023); MONT. CODE ANN. § 37-61-207 (2023); NEV. REV. STAT. Nev. Sup. Ct. Rules R. 73 (2023); N.M. RULES GOVERNING ADMISSION TO THE BAR. R. 15-304 (N.M. SUP. CT. 2010); OHIO REV. CODE ANN. Sup. Ct. Rules for the Gov't of the Bar R. I(9)(A) (West 2023); *Oath of Office for Admission to the Practice of Law in Oregon*, OR. STATE BAR, www.osbar.org/_docs/admissions/forms/OathCOVID.pdf [https://perma.cc/G3ZY-9KBH] (last visited Mar. 3, 2023); UTAH RULES OF PROF'L CONDUCT pmbl. [1] (2023); WASH. REV. CODE § 2.48.210 (2023). In addition, the Michigan lawyer's oath states, "I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed on members of the bar as conditions for the privilege to practice law in this state." This is not a direct quotation to the "rules of professional conduct," but it seems to invoke them. *See* MICH. COMP. LAWS Rules Concerning the State Bar R. 15, § 3 (2023).

9. The Kentucky, New Jersey, North Dakota, and Tennessee's lawyer's oaths are identical to oaths taken by judges and other public officials in those states. *See infra* App. A; KY. CONST. § 228; N.J. STAT. ANN. § 41:1-2 (2022); N.D. CENT. CODE § 27-11-20 (2023); N.D. CONST. art. XI, § 4; TENN. SUP. CT. RULES R. 6, § 4 (TENN. SUP. CT. 2023). Illinois and Nebraska only require support for both the state and federal constitutions, as well as the faithful discharge of the duties of an attorney "to the best of my ability." *See* 705 ILL. COMP. STAT. ANN. 205/4 (2022); NEB. REV. STAT. Neb. Ct. Rules § 3-128 (2023).

10. This is true in Illinois, Maryland, Nebraska, New York, North Dakota, Tennessee, West Virginia, and Wyoming. *See infra* App. A; 705 ILL. COMP. STAT. ANN. 205/4; MD. CODE ANN., BUS. OCC. & PROF. § 10-212 (West 2022); NEB. REV. STAT. Neb. Ct. Rules § 3-128; N.Y. CONST. art. XIII, § 1; N.D. CONST. art. XI, § 4; TENN. SUP. CT. RULES R. 6, § 4; W. VA. CODE Rules for Admission to the Prac. of L. R. 7.0(c) (2022); WYO. STAT. ANN. Rules & Procs. Governing Admission to the Prac. of L. R. 504(a) (2023).

11. *See, e.g.*, CAL. RULES OF CT. R. 9.7 (JUD. COUNCIL OF CAL. 2022); CAL. BUS. & PROF. CODE § 6067 (2021); *Attorney's Oath*, STATE BAR OF CAL. (2023), https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Attorneys-Oath [https://perma.cc/BMC5-9MQ3] (last visited Mar. 22, 2023); TENN. SUP. CT. RULES R. 6, § 4; W. VA. CODE Rules for Admission to the Prac. of L. R. 7.0.

12. *See, e.g.*, KY. CONST. § 228.

13. The lawyer's oaths in Maine, Massachusetts, and Rhode Island require "delaying no man" or to "delay no man's cause." ME. STAT. tit. 4, § 806; MASS. GEN. LAWS ch. 221, § 38; R.I. GEN. LAWS Sup. Ct. Rules art. II, R. 8 (2023).

14. *See infra* App. A; Jared A. Picchi, *Massachusetts Attorney's Oath: History that Should Never Be Repeated*, 13 U. MASS. L. REV. 306, 306 (2018). Texas recently amended its lawyer's oath to take out gender-specific pronouns. *See* Angela Morris, *Practicing Lawyers Invited to Take New Oath with New Lawyers*, TEX. LAW. (Nov. 13, 2015), https://www.law.com/texaslawyer/almID/1202742430575/ [https://perma.cc/Q6UV-V4NH] (providing a recent example of a state legislature purposefully removing gender-specific pronouns from its lawyer's oath).

15. No lawyer's oath in the United States currently mentions "discrimination" or even "equality." *See infra* App. A. This is surprising given the movement by state courts and bar associations to enact anti-discrimination rules. *See also State Court Statements on Racial Justice*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice [https://perma.cc/JJ7V-9MKH] (last visited Mar. 3, 2023); *Status of Antidiscrimination Rules in Each State*, NAT'L CONF. OF WOMEN'S BAR ASS'NS, https://ncwba.org/resources/diversityrules/status-of-antidiscrimination-rules-in-each-state/ [https://perma.cc/FUJ3-V363] (last visited Mar. 3, 2023).

The history of lawyer's oaths has been examined by legal scholars; however, few have compared the language included in lawyer's oaths throughout the United States.[16] In addition, there is little scholarship on the enforceability of lawyer's oaths for attorney disciplinary purposes, and the procedure by which lawyer's oaths are enacted and amended in each state. Given that state bars appear to be re-evaluating their standards for admission, as demonstrated by the widespread adoption of the Uniform Bar Exam,[17] the time is ripe to reconsider the tradition of lawyer's oaths.

This Article argues that lawyer's oaths may be a tool for building a dignified, respectful, and inclusive legal profession. However, to make lawyer's oaths impactful and accessible, the unremarkable, irrelevant, inappropriate, discriminatory, and obsolete language in lawyer's oaths must be removed and replaced by ethical guidance and aspiration, which, as this Article suggests, may be drawn from human rights norms. The model oath language and practical guidance in this Article are meant to encourage and assist states in amending and updating their lawyer's oaths.

Part I of this Article discusses a variety of theories regarding the purpose, function, and value of the lawyer's oath, concluding that lawyer's oaths may be useful as a tool to build a dignified, respectful, and inclusive legal profession. Part II examines the checkered past of lawyer's oaths and compares the language used in various lawyer's oaths. Part III discusses how lawyer's oaths are enacted and amended, and whether lawyer's oaths are enforced for attorney disciplinary purposes. Part IV suggests drawing on human rights norms for amendments to make lawyer's oaths more accessible and impactful. Part V provides models for incorporating human rights norms into lawyer's oaths. This Article concludes that it is past time to update lawyer's oaths. When considering updates to lawyer's oaths, the focus should be on simple, direct, and modern language. In addition, ethical aspiration and guidance, which may be drawn from human rights norms, should also be included.

I. THE LAWYER'S OATH: A TOOL TO BUILD A DIGNIFIED, RESPECTFUL AND INCLUSIVE LEGAL PROFESSION

A central premise of this Article is that lawyer's oaths can be a tool to help build a dignified, respectful, and inclusive legal profession. Yet, there is a dearth of recent scholarship on lawyer's oaths and not much on oaths in general.[18] With

16. *See infra* Part II.

17. *See Uniform Bar Exam*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/ube/ [https://perma.cc/8NSC-C7TT] (last visited Mar. 3, 2023).

18. *See* Andrews, *supra* note 2, at 57 ("For too long, the oaths have existed in the shadow of the modern rules of professional conduct."); MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH: ITS MEANING AND IMPORTANCE IN THE HISTORY OF OATHS 4 (1999) ("[S]cholarly interest in the President's oath . . . has never been consistently great. And in recent years, such interest appears to have reached an all-time low."); HERBERT J. SCHLESINGER, PROMISES, OATHS, AND VOWS: ON THE

such an apparent lack of scholarly interest in the lawyer's oath, questions emerge as to the function, purpose, and value of the lawyer's oath today: why require lawyers to take an oath at all and what outcomes can be hoped for in administering a lawyer's oath?

The few scholars to have addressed oaths differ greatly in their theories justifying them.[19] Some scholars focus on the function of oaths as promoting ethical guidance and moral aspiration.[20] Others have focused on the public nature of oath-taking and have argued that the public ceremony of the oath serves an important purpose, especially for lawyers as public citizens with duties towards the public good.[21] In addition, arguments have been put forth focusing on the value of the lawyer's oath as a contract that binds the conscience of the lawyer, even when—or especially when—there are no real-world consequences for violating the oath.[22] Scholars have also argued that the tradition of the oath promotes uniformity over time and place, connecting new lawyers to the centuries-old legal profession.[23] Lastly, I offer an additional argument: that lawyer's oaths can be an effective goal setting exercise for new attorneys. This Part will discuss each of these theories in turn.

A. OATHS CAN PROMOTE ETHICAL GUIDANCE AND MORAL ASPIRATION

Oaths often recite core values and ethical guidance.[24] For example, the oath of office of the President of the United States requires a pledge of faithful execution

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PSYCHOLOGY OF PROMISING 4 (2008) ("[P]romise keeping . . . has been almost totally ignored as a focus of systematic study by psychologists."); *see also* JONATHAN E. SOEHARNO, THE VALUE OF THE OATH (2020) (examining the value of oaths and oath-taking from ancient to modern times).

19. *See* Andrews, *supra* note 2, at 62.

20. *See id.* ("The oath can and should inspire lawyers as to both their essential ethical duties and their higher calling in their centuries-old profession."); SOEHARNO, *supra* note 18, at 40–42 (focusing on desires for justice, credibility, and social cohesion as the value of an oath); Lauren E. Bartlett, *A Human Rights Code of Conduct: Ambitious Moral Aspiration for a Public Interest Law Office or Law Clinic*, 91 ST. JOHN'S L. REV. 559, 568 (2017).

21. *See, e.g.*, Andrews, *supra* note 2, at 24; Irma S. Russell, *Introduction–21st Century Law, Technology, and Ethics: The Lawyer's Role as a Public Citizen*, 35 U. MEM. L. REV. 619, 621–23 (2005); *see also* SOEHARNO, *supra* note 18, at 42–44.

22. *See, e.g.*, Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 58–60 (2009); James S. Bowman & Jonathan P. West, *Oaths of Office in American States: Problems and Prospects*, 50 PUB. PERS. MGMT. 109, 111 (2021); *see also* PAULEY, *supra* note 18, at 28 (quoting JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), as quoted and discussed in the entry on "Oath" in JOHN LALOR ET AL., CYCLOPAEDIA OF POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES (1884) (arguing oaths are irrelevant)); *cf.* THOMAS HOBBES, LEVIATHAN, Part I, Chapter XIV (G.A.J. Rogers & Karl Schuhmann eds., 2005) ("It appears also, that the Oath addes nothing to the Obligation. For a Covenant, if lawfull, binds in the sight of God, without the Oath, as much as with it: if unlawfull, bindeth not at all; though it be confirmed with an Oath."); SOEHARNO, *supra* note 18, at 45 ("[T]he oath is not a surrogate for non-existent convictions, no requirement that can be sanctioned in and of itself and no magic bullet against misconduct.").

23. *See* Andrews, *supra* note 2, at 62 ("The oath can and should inspire lawyers as to both their essential ethical duties and their higher calling in their centuries-old profession.").

24. *See* SOEHARNO, *supra* note 18, at 40–41; *see also, e.g.*, Andrews, *supra* note 2, at 8 (discussing the "Hippocratic Oath").

of the office and a pledge to preserve, protect, and defend the Constitution.[25] Doctors taking the ancient Hippocratic Oath swear to abide by ethical principles such as confidentiality and to do no harm.[26] Lawyer's oaths also often, but not always, include ethical guidance as well. For example, the West Virginia lawyer's oath states, "I will conduct myself with integrity, dignity and civility,"[27] and the Wyoming lawyer's oath states, "I will faithfully and honestly and to the best of my ability discharge the duties of an Attorney and Counselor at Law."[28] Other lawyer's oaths include a pledge to uphold the rules of professional conduct.[29]

Lawyer's oaths can also promote moral aspiration.[30] For example, some lawyer's oaths encourage lawyers to strive to "uphold the honor and to maintain the dignity of the profession,"[31] and to "treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty."[32] In those examples, newly admitted attorneys are provided with high-reaching goals to strive to achieve.

Moral aspiration is arguably more important for inclusion in lawyer's oaths than general ethical guidance because ethical guidance is already included in the rules of professional conduct in each state. All too often, the rules focus on what types of behavior are unacceptable, instead of describing what a lawyer should do.[33] In addition, a general lack of moral aspiration for the legal profession perpetuates unhappiness and health problems for attorneys.[34]

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25. U.S. CONST. art. II, § 1, cl. 8.

26. Andrews, *supra* note 2, at 8, 8 n.15 (citing CHARLES J. MCFADDEN, MEDICAL ETHICS 461–62 (6th ed. 1968)).

27. W. VA. CODE Rules for Admission to the Prac. of L. R. 7.0.

28. WYO. STAT. ANN. Rules & Procs. Governing Admission to the Prac. of L. R. 504(a) (internal quotations omitted).

29. The Connecticut, Maine, Massachusetts, New Hampshire, and Vermont's lawyer's oaths do not include a pledge to uphold the U.S. Constitution, while all other state lawyer's oaths, including the lawyer's oath for the District of Columbia, do include such a pledge. *See supra* note 8.

30. *See* Bartlett, *supra* note 20, at 565 (defining moral aspiration as ambitions for highly ethical behavior and quoting Bernard Williams, *Professional Morality and Its Dispositions*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 259–69 (David Luban ed., 1983)).

31. *In re* Rules for Admission to the Bar of Montana, AF 11-0244 (Montana Court Order effective Jan. 26, 2017) ("I will strive to uphold the honor and to maintain the dignity of the profession to improve not only the law but the administration of justice.").

32. COLO. SUP. CT. OFF. OF ATT'Y REGUL. COUNS., *supra* note 8 ("I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty.").

33. *See* Bartlett, *supra* note 20, at Part II.

34. Bartlett, *supra* note 20, at 566 ("The current lack of moral aspiration is undermining the legal profession, perpetuating unhappiness and health problems that unhappy attorneys face."); *see also* Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554 (2015) (discussing the disproportionate number of unhappy people in the legal profession, as well as the reported high levels of emotional distress, dissatisfaction, and drug and alcohol addiction).

B. OATHS CAN EMPHASIZE THE LAWYER'S ROLE AS A PUBLIC CITIZEN WITH DUTIES TOWARDS THE PUBLIC GOOD

Oaths can also help emphasize the lawyer's role as a public citizen,[35] with a special responsibility for the quality of justice,[36] and with duties towards the public good.[37] For example, the Idaho lawyer's oath requires a pledge to "contribute time and resources to public service,"[38] and the Colorado lawyer's oath requires a pledge to "use my knowledge of the law for the betterment of society and the improvement of the legal system."[39] The Montana lawyer's oath requires a pledge "to uphold the honor and to maintain the dignity of the profession to improve not only the law but the administration of justice."[40] While some states contain language in the preamble to their rules of professional conduct regarding the lawyer as public citizen,[41] this language is also worthy of emphasis in the lawyer's oath.

The public nature of oath-taking is important as well. Reciting the lawyer's oath in public, surrounded by colleagues, friends, and family, judges, current attorneys, and the general public, helps highlight the public obligations of lawyers.[42] The public nature of taking the lawyer's oath emphasizes that the contents of the oath are not just relevant to the individual taking the oath—they pertain to the lawyer's community as well.[43] Public oath-taking communicates not only the values of the legal profession to the community,[44] but also the identity of the new entrants to the legal profession.

C. OATHS AS "CONTRACTS" THAT BIND THE LAWYER'S CONSCIENCE

The lawyer's oath is the main vehicle by which new lawyers promise to abide by ethical rules. In reciting the lawyer's oath, a new lawyer puts their integrity on the line by making "profound declaration[s] that 'bind[] the conscience.'"[45] A

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35. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (2018) [hereinafter MODEL RULES]; Irma S. Russell, *The Lawyer as Public Citizen: Meeting The Pro Bono Challenge*, 72 UMKC L. REV. 439, 446 (2003) (describing lawyers as public citizens whose special role in society is open to interpretation, but invokes an "affirmative commitment to the social goal of a just society"); Andrews, *supra* note 2, at 26; Picchi, *supra* note 14, at 308–09.

36. *See* MODEL RULES pmbl.

37. *See* Russell, *supra* note 35, at 446.

38. IDAHO BAR COMM'N RULES R. 220 (BD. OF COMM'RS OF THE IDAHO STATE BAR 2023).

39. COLO. SUP. CT. OFF. OF ATT'Y REGUL. COUNS., *supra* note 8.

40. *In re* Rules for Admission to the Bar of Montana, AF 11-0244 (Montana Court Order effective Jan. 26, 2017).

41. *See* DEL. LAWS.' RULES OF PROF'L CONDUCT pmbl. (2003).

42. *See* Andrews, *supra* note 2, at 55; SCHLESINGER, *supra* note 18, at 78, 188–98; Thaddeus Metz, *The Ethics of Swearing: The Implications of Moral Theories for Oath-Breaking in Economic Contexts*, 71 REV. SOC. ECON. 228, 244 (2013).

43. *See* Andrews, *supra* note 2, at 55; Metz, *supra* note 42, at 244; Richard S. Willen, *Rationalization of Anglo-Legal Culture: The Testimonial Oath*, 34 BRIT. J. SOC., 109, 123 (1983) (arguing that oath taking in public "may be regarded as a ritual expression which certifies the inner moral conscience of a witness"); SOEHARNO, *supra* note 18, at 42–44.

44. *See* SOEHARNO, *supra* note 18, at 42–44.

45. *See* Bowman & West, *supra* note 22, at 110–11.

core purpose or function of the lawyer's oath, therefore, is that the oath is a promise to oneself—a contract that binds the lawyer's conscience—to uphold the heavy obligations required by the legal profession.[46] The words contained in the oath can help bring to the surface the weight of the obligations and can even help bring a magical or spiritual feeling to the admission ceremony.[47] There are often no real-world consequences for violating an oath.[48] Therefore, the importance of taking the oath is that the lawyer's integrity is put on the line.[49]

Some scholars have also emphasized a commonsense theory for oaths of "what doesn't get said, doesn't get heard"[50]: this theory emphasizes the act of saying the words out loud—reciting promises being made upon entering the legal profession—and argues that is purpose enough for the lawyer's oath. When reciting the words of the lawyer's oath aloud, the lawyer hears their own promise, thereby binding their conscience.

D. LAWYER'S OATHS CAN PROMOTE UNIFORMITY IN THE LEGAL PROFESSION

Other scholars, including professors Carol Rice Andrews and Jonathan E. Soeharno, have suggested that lawyer's oaths may connect lawyers to age-old traditions.[51] Andrews also argues that keeping traditional language in lawyer's oaths can function to promote uniformity and better connect lawyers to the legal profession.[52]

However, the age of a tradition does not necessarily justify its continued use.[53] Often, calls for "uniformity" and "tradition" can reinforce racist, sexist, and classist systems and lead to the exclusion of people who have been historically marginalized.[54] This runs counter to the central premise of this Article, which envisions

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46. *See id.* at 111, 132.

47. *See, e.g.*, Andrews, *supra* note 2, at 6; SCHLESINGER, *supra* note 18, at 189–98; Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1330 (1959) (discussing oaths taken in the courtroom).

48. *See infra* Part III.

49. *See* Bowman & West, *supra* note 22, at 112.

50. *Id.* at 113 (citing Scott Eblin, *What Doesn't Get Said, Doesn't Get Done*, GOV. EXEC. (Apr. 9, 2010), https://cdn.govexec.com/b/interstitial.html?v=8.24.1&rf=https%3A%2F%2Fwww.govexec.com%2Fexcellence%2Fexecutive-coach%2F2010%2F04%2Fwhat-doesnt-get-saiddoesnt-get-heard%2F39776%2F [https://perma.cc/3ZYN-VRH8]).

51. *See, e.g.*, Andrews, *supra* note 2, at 60 ("[T]radition promotes uniformity over time and place and thereby better connects lawyers to their profession."); SOEHARNO, *supra* note 18 (tracing the tradition of oath taking from the Ancient Assyrians to today, describing one motive of oath as cohesion for the oath-taking community, as well as the tradition of disciplining oath-takers who violate oaths).

52. Andrews, *supra* note 2, at 51–54, 60 (discussing examples of how an oath can be used to exclude specific persons from the legal profession and how oaths can promote uniformity in the legal profession).

53. *See* David Halpin, Sally Power & John Fitz, *In the Grip of the Past? Tradition, Traditionalism and Contemporary Schooling*, 7 INT'L STUD. SOCIO. EDUC. 3–20 (1997).

54. *Id.*; *see* Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 16 (1990) ("The 'traditions' were those of racism."); Martin S. Flaherty, *Theories of Constitutional Self-Governance: The Better Angels of Self-Government*, 71 FORDHAM L. REV. 1773, 1783 (2003) ("[M]any traditions—racism, gender subordination—do not merit contemporary moral recognition no

a dignified, respectful, and inclusive legal profession. Promoting uniformity in a profession that has always been a good old (white) boys' club[55] undermines the work of many women and Black, Indigenous, and other lawyers of color, who have been trying to dismantle that view of the legal profession for decades now.[56] There is no need to connect to age-old traditions, when those traditions include the Jim Crow South,[57] or even the 1970s, when women were still prohibited from practicing law in some parts of the United States.[58]

Building a dignified, respectful, and inclusive legal profession will require updating lawyer's oaths, continuously, to reflect the relevant values of the legal profession of the day.[59]

E. LAWYER'S OATHS ARE AN EFFECTIVE GOAL SETTING EXERCISE

There is one additional theory to offer regarding the function or purpose of the lawyer's oath—a theory of goal setting. When a new lawyer recites the oath and promises "to treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty," that lawyer is setting professional and ethical goals to be met throughout their legal career. Goal setting is an important part of strategic planning,[60] an integral lawyering skill that every attorney must

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matter how deep their roots or enduring their existence. 'Tradition,' like 'history,' may provide important data, but such data requires self-conscious interpretation and evaluation, not blind obedience."); Russell G. Pearce, Eli Wald & Swethaa S. Ballakrishnen, *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2431 (2015).

55. *See, e.g.*, Kimberly Jade Norwood, *Gender Bias as the Norm in the Legal Profession: It's Still a [White] Man's Game*, 62 WASH. U. J.L. & POL'Y 25 (2020); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1977) (arguing that the bar is elitist, racist, and self-interested); Pearce, Wald & Ballakrishnen, *supra* note 54.

56. *See, e.g.*, COMM'N ON WOMEN IN THE PRO., AM. BAR ASS'N, YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL & GENDER BIAS (2018), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/october-november/new-you-cant-change-what-you-cant-see-interrupting-racial-gender-bias-the-legal-profession/ [https://perma.cc/M6WV-4ZJ8]; Nicole Johnson, *Glass Ceiling or Concrete Wall? Removing the Barriers to Gender Equality in the Legal Field Through Statutory Remedies*, 32 GEO. MASON U. CIV. RTS. L.J. 35, 41 (2021) (discussing the implications of the increase in the number of women in the legal profession); Adjoa Artis Aiyetoro, *Can We Talk? How Triggers for Unconscious Racism Strengthen the Importance of Dialogue*, 22 NAT'L BLACK L.J. 1, 33–34 (2009) [hereinafter Aiyetoro, *Can We Talk?*] (discussing African descendant lawyers' work to end discrimination in the legal profession); Adjoa Artis Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendant*s, 18 GEO. MASON U. CIV. RTS. L.J. 51, 85–87 (2007) [hereinafter Aiyetoro, *Truth Matters*] (discussing Black lawyers fighting against ABA discrimination).

57. *See, e.g.*, Aiyetoro, *Can We Talk?*, *supra* note 56; Aiyetoro, *Truth Matters*, *supra* note 56.

58. It was not until 1971 that the U.S. Supreme Court prohibited barring women from practicing law. *See* Reed v. Reed, 404 U.S. 71 (1971).

59. *See* SOEHARNO, *supra* note 18, at 43–44 ("[I]t is up to the entire oath community to continuously update the underlying values to the relevant requirements of the day. Making the oath credible is not only up to the banker, but to the bank. Not just to the lawyer, but also to the bar association.").

60. *See, e.g.*, Jaime Alison Lee, *From Socrates to Selfies: Legal Education and the Metacognitive Revolution*, 12 DREXEL L. REV. 227, 244 (2020).

master.[61] The practice of goal setting requires one to reflect on the goal, to be open to new ideas and information, and to revise goals when appropriate.[62] For example, when a new admittee to the bar recites the oath, they may contemplate what it means to respect all persons and how they plan to behave with clients, in and outside of court. In addition, when current members of the bar hear the oath recited by new admittees, they may consider their own goals and think about what changes they may want to undertake.[63] The lawyer's oath, therefore, can serve to reinforce the core lawyering skills of goal setting and strategic planning in addition to the other functions and purposes of oaths discussed above.

It is clear from this discussion of form and function that lawyer's oaths can be an important tool to promote professionalism and legal ethics. However, to be effective, many lawyer's oaths need significant overhauls and updates.

II. A BRIEF HISTORY OF LAWYER'S OATHS IN THE UNITED STATES

Legal scholars have chronicled detailed histories of lawyer's oaths, as well as the history of other oaths used in legal processes, ranging from the oath that witnesses take before testifying in court to the President's Oath of Office.[64] This Part provides a brief synopsis of the history of the language contained in lawyer's oaths, discussing the origins of common language and formats used, as well as recent amendments to lawyer's oaths in the United States. The checkered past of

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61. Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795, 862–64 (2012) (naming the top competencies or traits of lawyers as: drive, honesty, integrity, understanding others, obtaining and keeping clients, counseling clients, negotiation, problem solving, and strategic planning); Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 GONZ. L. REV. 1, 19 (1997–98) (quoting ROBERT MCCRATE, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS & THE PROFESSION: NARROWING THE GAP 266 (1992): "The MacCrate Report describes the skill of legal problem solving as follows: '[A] lawyer should be familiar with the skills and concepts involved in problem solving: identifying and diagnosing a problem, generating alternative solutions and strategies, developing a plan of action, implementing the plan, and keeping the planning process open to new information and ideas.'"); *see also* Shawn M. Glynn, Lori Price Aultman & Ashley M. Owens, *Motivation to Learn in General Education Programs*, 54 J. GEN. EDUC. 150, 158 (2005) (arguing that goal setting is key to motivation for learning). Clinical legal pedagogy has long recognized goal setting and planning as integral lawyering skills. *See, e.g.*, Minna J. Kotkin, *Creating True Believers: Putting Macro Theory into Practice*, 5 CLIN. L. REV. 95, 97 (1995); Victor M. Goode, *There Is a Method(ology) to This Madness: A Review and Analysis of Feedback in the Clinical Process*, 53 OKLA. L. REV. 223 (2000). The ABA Standards and Rules of Procedure for Approval of Law Schools also now impose on law schools an explicit obligation to "establish and publish learning outcomes designed to achieve these objectives." STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Objectives of Program of Legal Education, Standards 301, 302 (Am. Bar Ass'n 2021–22) [hereinafter ABA STANDARDS]. The learning outcomes must include both cognitive goals and skills objectives. Elizabeth Ford, *Toward a Clinical Pedagogy of Externship*, 22 CLIN. L. REV 113, 118 (2015); *see also* ABA STANDARDS, *supra*, at Standard 302.

62. *See* Lee, *supra* note 60, at 244.

63. *See, e.g.*, Andrews, *supra* note 2, at 55; SCHLESINGER, *supra* note 18, at 78, 189–98.

64. *See, e.g.*, Andrews, *supra* note 2; PAULEY, *supra* note 18; Milhizer, *supra* note 22; Picchi, *supra* note 14; Bowman & West, *supra* note 22; Leonard S. Goodman, *The Historic Role of the Oath of Admission*, 11 AM. J. LEGAL HIST. 404, 407 (1967).

the legal profession in the United States, marked by discrimination on the basis of race, gender, class, and more,[65] shines through in the history of lawyer's oaths. Instead of connecting lawyers to age-old discriminatory practices, lawyer's oaths should transcend the past and be remade as accessible, impactful, and effective tools to promote professionalism and legal ethics.

A. COLONIAL LAWYER'S OATHS

Oaths are an ancient tradition and lawyer's oaths hark back to the founding of the legal profession.[66] In the 1700s, when lawyer's oaths were first introduced in the American colonies, taking an oath was a solemn, life-changing ritual.[67] Oaths were understood then to directly implicate the oath-taker's personal sense of honor.[68] Taking an oath and swearing in blood, in the name of a god, or on a grave, struck listeners with awe.[69] Many people believed nothing would be able to dissuade the oath-taker from carrying out their intentions.[70] Oaths were important enough that one of the first acts of the first Congress of the United States in 1789 was to pass a bill regarding the oath for office holders.[71]

Though today 37% of lawyers are women, and 14% are people of color,[72] when many lawyer's oaths in the United States were first enacted in the 1700s, only upper-class white men were admitted to practice law.[73] Therefore, the state bar associations, court committees, and others that drafted and enacted the first lawyer's oaths in the United States in the 1700s were likely made up of only upper-class white men.[74]

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65. *See, e.g.*, Picchi, *supra* note 14, at 309.

66. Andrews, *supra* note 2, at 6–7.

67. *Id.* at 25.

68. *Id.*

69. *Id.*; SCHLESINGER, *supra* note 18, at 22 ("To swear in such a way struck listeners with awe, for they believed nothing thenceforth would be able to dissuade the swearer from the execution of his intention. He had surrendered control over himself; his pledge would take precedence over all reason.").

70. SCHLESINGER, *supra* note 18, at 22.

71. *See id.*

72. *Lawyers by Race and Ethnicity*, AM. BAR ASS'N (2020), https://www.americanbar.org/groups/young_lawyers/projects/men-of-color/lawyer-demographics/ [https://perma.cc/5YLH-7NZL].

73. *See* Cynthia Fuchs Epstein, *Positive Effects of the Multiple Negative: Explaining the Success of Black Professional Women*, 78 AM. J. SOCIO. 912, 918–21 (1973) ("Despite American Society's myth and credo of equality and open mobility, the decision-making elites and elite professions have long remained clublike sanctuaries for those of like kind."); *History*, N.Y. WOMEN'S BAR ASS'N, https://www.nywba.org/history2/ [https://perma.cc/5L3V-RCZ5]; *14 Groundbreaking Black Lawyers*, ABA J., https://www.abajournal.com/gallery/groundbreakingblack_lawyers/1918 [https://perma.cc/FA4J-KYPR]; *cf.* AM. BAR ASS'N, PROFILE OF THE LEGAL PROFESSION 25 (2022), https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf [https://perma.cc/D95U-ASNE] (explaining that the first female lawyer in the United States was Margaret Brent, who was recognized by the legislature as an attorney in 1648 in Maryland after coming over from England). The first female lawyer admitted to a bar in the United States was Arabella Mansfield in 1869 in Iowa. Kelly Buchanan, *Women in History: Lawyers and Judges*, LIBR. OF CONG. (2022), https://blogs.loc.gov/law/2015/03/women-in-history-lawyers-and-judges/ [https://perma.cc/NU38-5YVU].

74. *See* Nancy E. Dowd, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J. L. & PUB. POL'Y 11, 18 (2003) ("Historically, legal education was limited to white males; the profession and

The language used in the first lawyer's oaths in the United States reflected the gravitas assigned to oath-taking at that time but also the male dominance of the legal profession. For example, the Massachusetts Attorney's Oath of Office, which the state claims is the oldest lawyer's oath in the United States, first adopted in 1701,[75] reads:

> I (repeat the name) solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no *man* for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God.[76]

The oldest lawyer's oaths in the United Sates, including this Massachusetts oath, which predates the American Revolution, were adopted long before—in fact, hundreds of years before—states began enacting rules of professional conduct.[77] Lawyer's oaths served as the principal form of regulation for lawyers until the early 1900s when many states began to enact and adopt rules of professional responsibility.[78] Early on, lawyer's oaths were also the sole source of formal ethical guidance for new attorneys.[79] Ethical principles such as honesty, avoiding delay, using one's full intellectual abilities, and fidelity were all present in early lawyer's oaths, and language highlighting these principles endures in oaths today.[80]

Much of the language in early lawyer's oaths came from one of the earliest lawyer's oaths, formulated during the Elizabethan Era.[81] Today, much of the colonial-

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legal services were limited to white male lawyers and predominantly white male clients."); Epstein, *supra* note 73, at 918–21; *see also* Pearce, Wald & Ballakrishnen, *supra* note 54, at 2431 ("Prior to the 1960s, most large elite law firm partners were white Protestant men whose relationships with large elite entity clients were formed around family, socioeconomic and cultural class, and law school connections to business leaders.").

75. *See* Christopher P. Sullivan, *Massachusetts Attorney's Oath of Office*, MASS. BAR ASS'N LAWS. J. (Nov./Dec. 2017), https://www.massbar.org/publications/lawyers-journal/lawyers-journal-article/lawyers-journal-2017-november-december/massachusetts-attorney-s-oath-of-office [https://perma.cc/US22-AUCB].

76. MASS. GEN. LAWS ch. 221, § 38 (emphasis added). Some early lawyer's oaths have already been amended to use only gender-neutral terminology, such as changing the word "man" to "person." *See, e.g.*, N.H. REV. STAT. ANN. § 311:6.

77. In 1887, the Alabama State Bar Association promulgated the first code of ethics for lawyers. Andrews, *supra* note 2, at 35. The ABA adopted and published a national model ethics code (including a model oath) in 1908. *Id.*

78. HAZARD & DONDI, *supra* note 2, at 60; Andrews, *supra* note 2, at 50.

79. *See* Goodman, *supra* note 64, at 410.

80. *Id.*; *see, e.g.*, MASS. GEN. LAWS. ch. 221, § 38.

81. The Elizabethan oath read:

> Ye shall Swear, That well and truly ye shall serve the King's People as one of the Serjeants at the Law, and ye shall truly council them that ye shall be retained with after your Cunning; and ye shall not defer, tract, or delay their Causes willingly, for covetous of Money, or other Thing that may turn you to Profit; and ye shall give due Attendance accordingly; as God you help, and by the Contents of this Book.

Goodman, *supra* note 64, at 409.

era language contained in the oaths remains largely or entirely unchanged.[82] In fact, in addition to the Massachusetts lawyer's oath, seventeen additional lawyer's oaths across the United States still require lawyers to pledge not to delay for "lucre or malice."[83]

The use of obsolete language, such as the phrase "I will delay no man for lucre or malice" in lawyer's oaths today is problematic. It is difficult to feel an oath's gravitas if one does not connect with the words being used. Moreover, if new lawyers being sworn in recite words such as *lucre*,[84] without knowing exactly what that word means or connecting the words being said with an actual pledge, then there is little point to taking the oath.[85]

B. OTHER EARLY LAWYER'S OATHS IN THE UNITED STATES

Twenty states, the District of Columbia, and most federal courts use very simple oaths, focusing on a promise to uphold the constitution.[86] These simple lawyer's oaths date back to 1729 with origins in England.[87] An example of a simple

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82. For example, Pennsylvania's Oath reads much as it did more than 250 years ago:

> I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity, as well to the court as to the client, that I will use no falsehood, nor delay the cause of any person for lucre or malice.

42 PA. CONS. STAT. § 2522 (2022); *see also* KY. CONST. § 228.

83. The lawyer's oaths in Alabama, Delaware, Florida, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, and Wisconsin require lawyers not to delay for lucre or malice. *See* ALA. CODE § 34-3-15 (2022); DEL. SUP. CT. RULES R. 54 (DEL. SUP. CT. 2023); FLA. STAT. Oath of Admission to The Florida Bar (2023); KAN. STAT. ANN. Sup. Ct. Rules R. 726 (2022); *Lawyer's Oath*, LA. SUP. CT. COMM. ON BAR ADMISSIONS (2023), https://www.lascba.org/info/Admission/#oath [https://perma.cc/C2ZC-UYFS]; ME. STAT. tit. 4, § 806; MASS. GEN. LAWS. ch. 221, § 38; MICH. COMP. LAWS Rules Concerning the State Bar R. 15, § 3; MINN. STAT. § 358.07(9) (2023); MISS. CODE. ANN. § 73-3-35 (2023); N.H. REV. STAT. ANN. § 311:6; N.M. RULES GOVERNING ADMISSION TO THE BAR. R. 15-304; OKLA. STAT. ANN. tit. 5, § 2 (2023); 42 PA. CONS. STAT. § 2522; R.I. GEN. LAWS Sup. Ct. Rules art. II, R. 8; S.D. CODIFIED LAWS § 16-16-18 (2023); VT. STAT. ANN. tit. 12, § 5812; WIS. SUP. CT. RULES R. 40.15 (WIS. CT. SYS. 2022).

84. "Lucre" refers to riches or money, chiefly in a humorous sense, as in "filthy lucre." *See* 1 *Timothy* 3:3 (King James) ("Not given to wine, no striker, not greedy of filthy lucre; but patient, not a brawler, not covetous.").

85. *See supra* Part I (discussing the purpose of taking an oath of admission).

86. *See* CAL. RULES OF CT. R. 9.7; DEL. SUP. CT. RULES R. 54; GA. RULES GOVERNING ADMISSION TO THE PRAC. OF L. pt. B § 16; 705 ILL. COMP. STAT. ANN. 205/4; MD. CODE ANN., BUS. OCC. & PROF. § 10-212; MINN. STAT. § 358.07(9); MISS. CODE. ANN. § 73-3-35; NEB. REV. STAT. Neb. Ct. Rules § 3-128; N.J. STAT. ANN. § 41:1-2; N.Y. CONST. art. XIII, § 1; N.D. CENT. CODE § 27-11-20; OKLA. STAT. ANN. tit. 5, § 2; OR. STATE BAR, *supra* note 8; 42 PA. CONS. STAT. § 2522; S.C. CT. RULES R. 402(h)(3) (S.C. JUD. BRANCH 2022); S.D. CODIFIED LAWS § 16-16-18; TENN. SUP. CT. RULES R. 6, § 4; VA. CODE ANN. § 54.1-3903 (2023); W. VA. CODE Rules for Admission to the Prac. of L. R. 7.0.; WYO. STAT. ANN. Rules & Procs. Governing Admission to the Prac. of L. R. 504(a); *see also* D.C. CT. APP. RULES R. 46(l) (D.C. CT. APP. 2021); *Attorney Oath of Admission*, U.S. CTS., http://www.uscourts.gov/forms/attorney-forms/attorney-oath-admission [https://perma.cc/PF2Y-7UUV] (last visited Feb. 28, 2023).

87. Andrews, *supra* note 2, at 48.

lawyer's oath is the oath of admission to the Supreme Court of the United States, which was adopted in 1790 and remains unamended today.[88] That oath reads, "I, _____, do solemnly swear (or affirm) that as an attorney and as a counselor of this Court I will conduct myself uprightly and according to the law, and that I will support the Constitution of the United States."[89]

While short and seemingly to the point, these simple oaths are also problematic. First, there is no mention of ethical rules or any pledge to follow ethical guidance. Second, the brief pledges that are contained in this oath are vague and inappropriate at the same time. A pledge to support the Constitution in a lawyer's oath is difficult if not impossible to enforce:[90] Does "support" preclude arguing for a new constitutional convention? Does the pledge to support the Constitution include all doctrines laid down by the Supreme Court, just the written document, or some other conglomeration of laws?[91] Acts of treason, sedition, or other potential violations of a pledge to support the constitution are arguably better dealt with through criminal law and not legal ethics given that there is tricky history there.[92] Moreover, there are a growing number of scholars arguing that the Constitution is outdated,[93] broken,[94] and even "unworthy of the

88. *Application for Admission to Practice*, U.S. SUP. CT., https://www.supremecourt.gov/bar/barapplication.pdf [https://perma.cc/2D4G-TFYB] (last visited Feb 28, 2023).

89. *Id.* at 2. Another example of a simple lawyer's oath is the California lawyer's oath. *See* CAL. RULES OF CT. R. 9.7.

90. *See, e.g.*, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 260 (1994).

91. There is an entire body of legal scholarship on the subject of the ontology of the U.S. Constitution. *See, e.g.*, Evan D. Bernick, *43rd Annual Symposium Articles: The Morality of the Presidential Oath*, 47 OHIO N.U. L. REV. 33 (2021).

92. *See* Basile, *supra* note 7, at 1847 (discussing the problematic history of the pledge to support the Constitution in lawyer's oaths and arguing that attorneys have often defended clients with unpopular causes and have risked having their own loyalty to the United States called into question). Admittedly, there is overlap between legal ethics regulations and criminal law. *See, e.g.*, MODEL RULES R. 8.4(b). However, given the history of pledges of allegiance being used to exclude certain persons (i.e., lawyers who support "communism" and "anti-war efforts") from the legal profession, it seems wise to avoid using the lawyer's oath in this context. *See* Basile, *supra* note 7.

93. The U.S. Constitution is the oldest written charter of government. *Constitution of the United States*, U.S. SENATE https://www.senate.gov/civics/constitution_item/constitution.htm [https://perma.cc/D33P-J2R5] (last visited Mar. 8, 2023). State constitutions, on the other hand, are almost constantly amended. *See* Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 67–69 (2019); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1644–45 (2014).

94. *See, e.g.*, Rachel Reed, "*Our Original Constitution Was Both Brilliant and Highly Flawed,"* HARV. L. TODAY (Sept. 15, 2021), https://hls.harvard.edu/today/brilliant-and-highly-flawed/ [https://perma.cc/M6WM-VTTJ]; Ryan D. Doerfler & Samuel Moyn, *Opinion: The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022) (discussing NOAH FELDMAN, THE BROKEN CONSTITUTION (2021)); Michael Gerhardt, *Madison's Nightmare Has Come to America*, ATLANTIC (Feb. 13, 2020), https://www.theatlantic.com/ideas/archive/2020/02/constitution-flawed/606208/ [https://perma.cc/YA9S-83N6] ("The lesson in all this isn't that the Constitution has recently broken so much as that its flaws, always present, have been fully revealed."); Richard Albert, *Time to Update the Language of the Constitution*, UT NEWS (Jul. 6, 2020), https://news.utexas.edu/2020/07/06/time-to-update-the-language-of-the-constitution/ [https://perma.cc/4X6K-TRMA]; Greg Coleridge & Jessica Munger, *The U.S. Constitution is Hopelessly Outdated. It's Time to Re-envision It,*

people"[95] due to concerns that it is undemocratic, racist, and sexist. Instead of focusing on vague pledges to support the constitution, states should require a direct promise to uphold the states' rules of professional conduct in the lawyer's oath.[96]

Finally, the simple lawyer's oaths often contain outdated language. For example, the oath of admission for the Supreme Court of the United States includes a pledge to conduct oneself "uprightly." "Uprightly" may have referred to strong moral rectitude in 1790;[97] however, today, "upright" is usually used to refer to being vertical or erect in posture.[98] This terminology is awkward and ableist for attorneys with disabilities. It should not matter whether an attorney is upright (per today's definition) when practicing law. Updating the oath with modern, direct language, such as a pledge to conduct oneself with dignity and integrity, would be more accessible, impactful, and inclusive.

Other early lawyer's oaths include the notorious Kentucky oath, which was enacted in 1849 and remains unchanged today.[99] The Kentucky oath requires lawyers seeking admission to the Kentucky Bar to swear that they "have not fought a duel with deadly weapons within this State, nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, nor aided or assisted any person thus offending."[100]

SALON (Dec. 10, 2020), https://www.salon.com/2020/12/10/the-us-constitution-is-hopelessly-outdated-its-time-to-re-envision-it/ [https://perma.cc/96KB-76VL] ("Americans view the constitution as a sacred text, even as its flaws are becoming more glaring."); Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 1, 2013), https://www.newyorker.com/magazine/2013/12/09/our-broken-constitution [https://perma.cc/3L49-D52Y] (discussing SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006)).

95. *See* Gabriel J. Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431, 450 (2003) ("There are respectable arguments that the Constitution is unworthy of the people. . . . The race critique is central; one could understand how, before 1865 or 1954, a person of color would have hesitated to swear loyalty to the Constitution of slavery . . . women had no hand in shaping most of the document and arguably continue to be patronized by it.").

96. There are several states that do not include a promise to uphold the rules of professional conduct in the lawyer's oath. *See supra*, note 29.

97. *Upright*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/upright [https://perma.cc/JGE7-GJDP] (last visited Feb. 21, 2023).

98. *Id.*

99. KY. CONST. § 228; Adam K. Raymond, *New Kentucky Governor Takes Oath, Swears He's Never Fought a Duel*, N.Y. MAG. (Dec. 10, 2019), https://nymag.com/intelligencer/2019/12/new-kentucky-gov-takes-oath-swears-hes-never-fought-a-duel.html [https://perma.cc/YN8H-3ETY].

100. KY. CONST. § 228. The full Kentucky oath reads:

> I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of this Commonwealth, and be faithful and true to the Commonwealth of Kentucky so long as I continue a citizen thereof, and that I will faithfully execute, to the best of my ability, the office of. . . according to law; and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons within this State, nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, nor aided or assisted any person thus offending, so help me God.

Id. The lawyer's oath is the same oath that all public officials in Kentucky must take. *See id*.

The Commonwealth of Kentucky is the only state to require newly admitted lawyers today to promise that they will not fight a duel.[101] Making new lawyers in Kentucky take the pledge not to duel is superfluous, if not inappropriate. The last known duel in Kentucky took place in the 1860s.[102] Moreover, dueling was entirely limited to wealthy white men in its heyday[103] and the Kentucky Bar has made commitments to diversify the legal profession.[104] There have been recent efforts to amend the Kentucky oath, but those efforts have been unsuccessful.[105]

C. THE 1908 MODEL LAWYER'S OATH

The American Bar Association ("ABA")[106] has historically had a great deal of influence on the language used in lawyer's oaths across the United States. Since its founding in 1878,[107] the ABA has played a central role in developing ethics rules and promoting professionalism in the legal profession.[108] However, the ABA also played a central role in excluding non-white and non-male lawyers from the legal profession, which is reflected in ethical rules and lawyer's oaths.[109] When the ABA released a model lawyer's oath in 1908,[110] no female or Black

101. *See infra* App. A.

102. *See* Raymond, *supra* note 99.

103. *See* JOE L. COKER, LIQUOR IN THE LAND OF THE LOST CAUSE: SOUTHERN WHITE EVANGELICALS AND THE PROHIBITION MOVEMENT 177 (2007); DICK STEWARD, DUELS AND THE ROOTS OF VIOLENCE IN MISSOURI 86 (2000).

104. *Diversity Statement*, KY. BAR ASS'N, https://www.kybar.org/page/diversity [https://perma.cc/T2ZB-GVWN] (last visited Feb. 21, 2023).

105. *See* Stu Johnson, *Kentucky Duels Over Oath of Office*, NPR (Mar. 12, 2010), https://www.npr.org/2010/03/12/124616129/kentucky-duels-over-oath-of-office [https://perma.cc/P8MN-JQRU].

106. *About the American Bar Association*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/?http://utm_medium=sem&utm_source=google&utm_campaign=extension= [https://perma.cc/2F9H-H5XZ] (last visited Feb. 21, 2023).

107. *See ABA Timeline*, AM. BAR ASS'N (2020), https://www.americanbar.org/about_the_aba/timeline/ [https://perma.cc/QYR2-Z8BK] (last visited Feb. 21, 2023).

108. *See* Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 30 (1999); James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2422–26 (2003); *see also* Bartlett, *supra* note 20, at 571.

109. The first Black lawyer was not admitted to the ABA until 1950. *See* AM. BAR ASS'N, *supra* note 107. The first woman was admitted to the ABA in 1918. *See Historical Women*, AM. BAR ASS'N, https://www.abajournal.com/gallery/historical_women/756 [https://perma.cc/E48Z-MZD8] (last visited Feb. 21, 2023).

110. The ABA's 1908 *Model Oath* stated:

> I DO SOLEMNLY SWEAR:
> I will support the Constitution of the United States and the Constitution of the State of . . . ;
> I will maintain the respect due the Courts of Justice and judicial officers;
> I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;
> I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;
> I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;
> I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

lawyers were admitted as members to the ABA.[111] The organization recommended that this *Model Oath* be adopted by all of the U.S. states and territories.[112]

Some of the language from the ABA's *Model Oath* was drawn directly from the Elizabethan oath, including the promise not to "delay any man's cause for lucre or malice."[113] However, other language in the 1908 *Model Oath* was new, such the promise to "never reject, from any consideration personal to myself, the cause of the defenseless or oppressed."[114]

Much of the language from the 1908 *Model Oath* endures in lawyer's oaths across the United States today, more than a hundred years after the *Model Oath* was released. The language of the oaths in five states remains identical or almost identical to the 1908 model lawyer's oath;[115] in two additional states, the lawyer's oath remains identical to the *Model Oath* besides the addition of a sentence or two;[116] and the "defenseless or oppressed" language also shows up in fourteen state lawyer's oaths today.[117] Shortly after its adoption, the ABA shifted its focus away from the *Model Oath* and toward the *Model Rules of Professional*

> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any *man's* cause for lucre or malice. *SO HELP ME GOD*.

CANONS OF PROF'L CONDUCT Canon 3 (1908) [hereinafter 1908 CANONS] (emphasis added).

111. *See* AM. BAR ASS'N, *supra* note 107.

112. *See* 1908 CANONS Canon 3 ("We commend this form of oath for adoption by the proper authorities in all the states and territories."). The ABA continued to play a central role in the development of lawyer's oaths in the decades that followed. *See, e.g.*, Basile, *supra* note 7 (discussing the 1950 ABA resolution that "requested state bars to require each attorney to take an 'anti-Communist' oath and to file an affidavit stating whether he was or ever had been a member of the Communist Party or any organization advocating the overthrow of the United States government").

113. 1908 CANONS Canon 3; Goodman, *supra* note 64, at 407–08.

114. *See* 1908 CANONS Canon 3.

115. The Indiana, Iowa, Michigan, Washington, and Wisconsin Lawyer's oaths are almost identical to the 1908 *Model Oath*. *See* IND. CODE tit. 34, R. 22 (2023); Roxann Ryan, *Students Propose Statutory Changes in Iowa Lawyer's Oath*, IOWA LAW. 8 (May 2005), https://libguides.law.drake.edu/ld.php?content_id=9410100 [https://perma.cc/69DM-YQ66]; MICH. COMP. LAWS Rules Concerning the State Bar R. 15, § 3; WASH. REV. CODE § 2.48.210; WIS. SUP. CT. RULES R. 40.15.

116. The Louisiana lawyer's oath contains one additional sentence: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." LA. SUP. CT. COMM. ON BAR ADMISSIONS, *supra* note 83. The Florida oath contains the same language, except adds one additional paragraph on conduct towards opposing parties and their counsel. FLA. STAT. Oath of Admission to The Florida Bar.

117. The lawyer's oaths in Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Louisiana, Michigan, Missouri, New Mexico, South Carolina, South Dakota, Washington, and Wisconsin all contain the term "defenseless or oppressed." ARK. RULES GOVERNING ADMISSION TO THE BAR R. 7(G); COLO. SUP. CT. OFF. OF ATT'Y REGUL. COUNS., *supra* note 8; FLA. STAT. Oath of Admission to The Florida Bar; IDAHO CODE § 3-201; IND. CODE tit. 34, R. 22; Ryan, *supra* note 115; LA. SUP. CT. COMM. ON BAR ADMISSIONS, *supra* note 83; MICH. COMP. LAWS Rules Concerning the State Bar R. 15, § 3; MO. ANN. STAT. R. 8.15; N.M. RULES GOVERNING ADMISSION TO THE BAR. R. 15-304; S.C. CT. RULES R. 402(h)(3); S.D. CODIFIED LAWS § 16-16-18; WASH. REV. CODE § 2.48.210; WIS. SUP. CT. RULES R. 40.15.

Responsibility,[118] and later, the *Model Rules of Professional Conduct* ("*Model Rules*").[119]

Given that the ABA has never released another version of its *Model Oath* and made only one minor amendment to the oath in 1977,[120] the ABA should consider drafting and publishing an updated model lawyer's oath taking into consideration the arguments, suggestions, and guidelines contained in this Article. If the ABA were to adopt a new model lawyer's oath that included human rights norms,[121] or even a pledge to uphold human rights, history tells us that many states would be likely to adopt its model oath.[122]

D. CIVILITY AMENDMENTS TO LAWYER'S OATHS

Recent efforts to address civility in the legal profession have served as an impetus to amend lawyer's oaths. Incivility has long been a concern for the legal profession,[123] but the civility movement really gained steam starting the late 1980s and continues to be influential today.[124] Over the years, a total of thirteen states have amended their lawyer's oaths to add pledges of civility.[125] West

118. Andrews, *supra* note 2, at 43.

119. *Id*. at 34.

120. *Id*. at 43. No state has adopted the ABA's amended *Model Oath* language. *Id* at 43–44.

121. For more on what is meant by "human rights norms," see *infra* Part IV.

122. By 1924, the 1908 *Canons* had been adopted, with minor modifications, by "almost all of the state and local bar associations of the country." STANDING COMM. ON PRO. ETHICS & GRIEVANCES, AM. BAR ASS'N, REPORT OF THE STANDING COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, 49 A.B.A. Rep. 466, 467 (1924). It is unclear whether the *Model Oath* was adopted along with the *Canons*. However, 1908 *Model Oath* language endures in seven states' lawyer's oaths today. *See* FLA. STAT. Oath of Admission to The Florida Bar; IND. CODE tit. 34, R. 22; Ryan, *supra* note 115; LA. SUP. CT. COMM. ON BAR ADMISSIONS, *supra* note 83; MICH. COMP. LAWS Rules Concerning the State Bar R. 15, § 3; WASH. REV. CODE § 2.48.210; WIS. SUP. CT. RULES R. 40.15.

123. *See* Bartlett, *supra* note 20, at 559 ("Incivility and unethical behavior in the legal profession have long been topics of concern in the United States."); Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 608–13 (2016) (discussing bar leaders' and scholars' complaints regarding the "decline, betrayal, or death" of civility in the legal profession for more than a generation); David Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 241 (2013); KEITH BYBEE, HOW CIVILITY WORKS 3 (2016); Donald E. Campbell, *Raise Your Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 101–02 (2012); *see also* Amy. R. Mashburn, *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s: Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 675–76 (1994).

124. *See, e.g*., COMM'N ON PROFESSIONALISM, AM. BAR ASS'N, "... IN THE SPIRT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986); Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 294 (1995); *see also* Grenardo, *supra* note 123, at 250 ("The legal profession's response to incivility includes, among other things, numerous state and local bar associations adopting guidelines of civility . . . state bars adding civility in their oaths for newly admitted lawyers, and . . . several states requiring civility."); Andrews, *supra* note 2, at 46; *Civility Matters*, ABOTA FOUND., https://www.abota.org/Foundation/Foundation/Professional_Education/Civility_Matters.aspx [https://perma.cc/ZK8J-2242] (last visited Mar. 8, 2023).

125. Arkansas, Florida, Hawaii, Iowa, Louisiana, Montana, New Mexico, Ohio, Oregon, South Carolina, Texas, Utah, and West Virginia have all amended their lawyer's oaths in recent years to include civility. *See In re* Attorney Oath of Admission, 2012 Ark. 82 (Arkansas Court Order effective Feb. 23, 2012); *Revised*

Virginia amended its lawyer's oath in 2021 to add: "I will conduct myself with integrity, dignity and *civility* and show respect toward judges, court staff, clients, fellow professionals and all other persons."[126] Florida, in 2011, based on "concerns . . . about acts of incivility among members of the legal profession," added a pledge of civility to its lawyer's oath, which reads, "I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."[127]

Despite much agreement that the legal profession should be more "civil,"[128] there is still much disagreement over what types of behavior should count as "civil."[129] While civility pledges may seem to be a good idea in theory, imposing civility can help maintain or exacerbate "racial, gendered, heteronormative, and ableist hierarchies."[130] In fact, calls for civility can often help expose interests in thwarting more equitable processes and outcomes; oppressed peoples call for equality, dignity, and humanity—rarely civility.[131]

Admission Oath Now Emphasizes Civility, FLA. BAR, https://www.floridabar.org/the-florida-bar-news/revised-admission-oath-now-emphasizes-civility/ [https://perma.cc/8VP5-5ZHZ]; HAW. SUP. CT. RULES R. 1.5; Ryan, *supra* note 115; LA. SUP. CT. COMM. ON BAR ADMISSIONS, *supra* note 83; Memorandum in Support of Application Invoking Original Jurisdiction of this Court Pursuant to Section VI, Internal Operating Rules, to Regulate the Bar of Montana, at 1, 4, *In re* Application of the American Board of Trial Advocates (ABOTA), Montana Chapter, Seeking Adoption and Implementation of ABOTA's "Civility Matters" Programs (July 2, 2010); N.M. RULES GOVERNING ADMISSION TO THE BAR. R. 15-304; S.C. CT. RULES R. 402(h)(3); OHIO REV. CODE ANN. Sup. Ct. Rules for the Gov't of the Bar R. I(9)(A); OR. STATE BAR, *supra* note 8; David Chamberlain, *Celebrating Civility: How a New Oath is Uniting Lawyers Across the State*, 78 TEX. BAR J. 858 (2015); UTAH RULES OF PROF'L CONDUCT pmbl. [1]; Press Release, W. Va. Sup. Ct. App., *supra* note 1; *see also* Andrews, *supra* note 2, at 61. In addition, in Arizona and Utah, lawyers swear to adhere to the state civility code while taking the lawyer's oath. The Arizona lawyer's oath requires a pledge to adhere to A Lawyer's Creed of Professionalism of the State Bar of Arizona. *See* ARIZ. SUP. CT. RULES R. 41(h). The Utah lawyer's oath requires lawyers to pledge to "faithfully observe . . . the Standards of Professionalism and Civility." UTAH RULES OF PROF'L CONDUCT pmbl. [1].

126. Press Release, W. Va. Sup. Ct. App., *supra* note 1 (emphasis added).

127. Grenardo, *supra* note 123, at 252 (citing *In re* Fla. Bar, 73 So.3d 149, 149–50 (2011)); Keith W. Rizzardi, *Expectations in the Mirror: Lawyer Professionalism and the Errors Of Mandatory Aspirations*, 44 FLA. ST. U. L. REV. 692, 699 (2017).

128. *See* Grenardo, *supra* note 123, at 242; Cheryl B. Preston & Hilary Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement*, 48 U. MICH. J. L. REFORM 701 (2015); Atkinson, *supra* note 124, at 259 (discussing "civility" pledges and other moves to mandate courtesy and civility); *see also* Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy,* 28 VAL. U. L. REV. 657, 663 (1994) (arguing that civility codes are attempts by an increasingly isolated legal elite to impose their values on other lawyers that they consider less prestigious); Campbell, *supra* note 123, at 105 ("Others, however, are skeptical of the civility movement and see the effort as motivated by the self-interest of a select few to keep the bar as insulated as possible.").

129. *See* BYBEE, *supra* note 123, at 5; Grenardo, *supra* note 123, at 242; Atkinson, *supra* note 124, at 294 (describing incivility as a "know-it-when-I-see-it" problem"); Lynn Mie Itagaki, *The Long Con of Civility*, 52 CONN. L. REV. 446 (2021).

130. Itagaki, *supra* note 129, at 1171; *see* CodeSwitch, *When Civility is Used as a Cudgel Against People of Color*, NPR (Mar. 14, 2019), https://www.npr.org/sections/codeswitch/2019/03/14/700897826/when-civility-is-used-as-a-cudgel-against-people-of-color [https://perma.cc/DDL6-QF3Q].

131. Itagaki, *supra* note 129, at 1182.

E. PROMISING VS. SWEARING VS. AFFIRMING A LAWYER'S OATH

Traditionally, the lawyer's oath begins with "I swear"[132] and ends with "so help me God."[133] In other words, all oaths were at one time sworn to God.[134] As late as the 1960s, many jurisdictions required such an oath.[135] The tradition of sworn oaths is deeply rooted in Christianity and the long-held stereotype that "[p]romises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist."[136]

By the end of the twentieth century, every jurisdiction in the United States except Oklahoma had enacted a statute allowing the oath-taker to choose to either swear or affirm an oath.[137] While attorneys being admitted to the bar have legally had the option to swear or affirm oaths for several decades, the text of many lawyer's oaths do not reflect that choice.[138] These oaths should be amended to expressly allow for a choice of words—e.g. "I swear or affirm," "I declare,"[139] or "I promise"[140]—or states should consider removing such language altogether.

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132. *See, e.g.*, 1908 CANONS Canon 3.

133. *See* 1908 CANONS Canon 3.

134. *See* Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (holding that the requirement of declaration of a belief in the existence of God, as a test for office, invaded the freedom of belief and religion of the petitioner).

135. *See id.*

136. JOHN LOCKE, A LETTER CONCERNING TOLERATION 32 (1689); Milhizer, *supra* note 22, at 29.

137. Milhizer, *supra* note 22, at 39; *see also* Torcaso, *supra* note 134; Cox v. State, 79 S.E. 909, 909 (Ga. Ct. App. 1913); State v. Davis, 418 S.E.2d 263, 265 (N.C. Ct. App. 1992), *pet. denied*, 426 S.E.2d 710 (N.C. 1993).

138. The lawyer's oaths in Florida, Georgia, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, North Carolina, Oklahoma, Rhode Island, Texas, Utah, and Wyoming all officially use the term "swear" instead of providing the option of affirming. *See* FLA. STAT. Oath of Admission to The Florida Bar; GA. RULES GOVERNING ADMISSION TO THE PRAC. OF L. pt. B § 16; ME. STAT. tit. 4, § 806; MASS. GEN. LAWS ch. 221, § 38; MINN. STAT. § 358.07(9); MO. ANN. STAT. R. 8.15; NEB. REV. STAT. Neb. Ct. Rules § 3-128; N.J. STAT. ANN. § 41:1-2; N.C. CONST. art. VI, § 7; N.C. GEN. STAT. § 11-11 (2022); OKLA. STAT. ANN. tit. 5, § 2; R.I. GEN. LAWS Sup. Ct. Rules art. II, R. 8; TEX. GOV'T CODE ANN. § 82.037 (West 2021); UTAH RULES OF PROF'L CONDUCT pmbl. [1]; WYO. STAT. ANN. Rules & Procs. Governing Admission to the Prac. of L. R. 504(a).

139. The Washington lawyer's oath, for example, does not require swearing or affirming, but instead requires new lawyers to "solemnly declare." WASH. REV. CODE § 2.48.210.

140. Jurisdictions may consider allowing newly admitted lawyers to "promise" instead of "affirm" or "swear." Promises are heavily emphasized in law practice today through contract law and promises are very familiar to attorneys trained to practice in the United States. *See, e.g.*, Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709, 727 (2011) ("[I[t is useful to speak of contract as a kind of promise (distinct from the substantial subset of promise that is private promise) because it highlights certain moral properties that contract has in common with other kinds of promise."); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1514 (2004) ("When persons make promises and contracts, they cease to be strangers and come to treat each other, affirmatively, as ends in themselves."); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1614 (2009) ("[C]ontract law enforces promises, which create moral obligations, not duties."). Interestingly, only New Jersey uses the word "promise" in its lawyer's oath, requiring newly admitted lawyers to state "I do solemnly promise and swear. . ." *See* N.J. STAT. ANN. § 41:1-2.

III. PROCESS AND ENFORCEABILITY CONCERNS FOR AMENDMENTS TO LAWYER'S OATHS IN THE UNITED STATES

There are many good reasons to amend lawyer's oaths, including, as discussed above, to remove inappropriate, discriminatory, and obsolete language. Amending lawyer's oaths is easier in some states than others, especially since many states continue to use the lawyer's oath for attorney disciplinary purposes.[141] In the states that continue to enforce their lawyer's oath for attorney disciplinary purposes, amendments must avoid the use of vague language and should differentiate between ethical aspiration and promises that are meant to be enforced, as seen in the examples presented in Part V. This Part discusses each state's approach to enacting and enforcing lawyer's oaths, highlighting how easy it may be for many states to amend lawyer's oaths through bar association or supreme court committees.

Nineteen state legislatures have codified their lawyer's oath as a statute enacted by the state legislature.[142] In Kentucky, New York, and North Dakota, the oath taken by newly admitted lawyers is in the state constitution.[143] When an oath is codified by statute or incorporated into the state constitution, enacting amendments may be procedurally difficult and time-consuming depending on the state legislative process.[144]

Twenty-two states and the District of Columbia have adopted their lawyer's oath as a rule of court or a rule governing admission to the bar.[145] In those

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141. Twenty-six states and the District of Columbia enforce their lawyer's oath for attorney disciplinary purposes. Arizona, California, Florida, Idaho, Iowa, Kansas, Minnesota, Montana, Nebraska, New Mexico, South Carolina, South Dakota, Washington, Wisconsin, and the District of Columbia have statutes that provide for the enforcement of the lawyer's oath for attorney disciplinary purposes. *See infra* App. A. In addition, in Arkansas, Colorado, Connecticut, Delaware, Illinois, Maine, Massachusetts, New Hampshire, Ohio, Oregon, Pennsylvania, and Utah, case law suggests that lawyers are disciplined for violations of the lawyer's oath. *See infra* App. A. In the remaining twenty-four states, Alabama, Alaska, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia and Wyoming, the lawyer's oath is not enforced for attorney disciplinary purposes. *See infra* App. A.

142. Alabama, Connecticut, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, Oklahoma, Pennsylvania, South Dakota, Texas, Vermont, Virginia, and Washington have codified their lawyer's oath into a statute. *See infra* App. A; AL CODE § 34-3-15; CONN. GEN. STAT. § 1-25; 705 ILL. COMP. STAT. ANN. 205/4; IND. CODE tit. 34, R. 22; ME. STAT. tit. 4, § 806; MD. CODE ANN., BUS. OCC. & PROF. § 10-212; MASS. GEN. LAWS ch. 221, § 38; MINN. STAT. § 358.07 (9); MISS. CODE. ANN. § 73-3-35; N.H. REV. STAT. ANN. § 311:6; N.J. STAT. ANN. § 41:1-2; N.C. CONST. art. VI, § 7; N.C. GEN. STAT. § 11-11; OKLA. STAT. ANN. tit. 5, § 2; 42 PA. CONS. STAT. § 2522; S.D. CODIFIED LAWS § 16-16-18; TEX. GOV'T CODE ANN. § 82.037; VT. STAT. ANN. tit. 12, § 5812; VA. CODE ANN. § 54.1-3903; WASH. REV. CODE § 2.48.210.

143. *See infra* App. A; KY. CONST. § 228; N.Y. CONST. art. XIII, § 1; N.D. CONST. art. XI, § 4.

144. *See, e.g.*, Marshfield, *supra* note 93, at 76–77; John Dinan, *The Unconstitutional Constitutional Amendment Doctrine in the American States: State Court Review of State Constitutional Amendment*s, 72 RUTGERS U. L. REV. 983, 996 (2020).

145. Alaska, Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, Ohio, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, Wisconsin, Wyoming, and the District of Columbia. *See infra* App. A; ALASKA BAR RULES R. 5 § 3; ARIZ.

jurisdictions where a bar or court committee is in charge, amendments to lawyer's oaths may be easier than amending a statute since there are many fewer people involved in the process and all are lawyers or judges.[146] However, many of these same states enforce their lawyer's oaths for attorney disciplinary purposes, which makes the language used in amendments critical.

In California, Colorado, Florida, Iowa, Louisiana, and Oregon, the lawyer's oaths do not appear to be codified or otherwise enacted as a rule, regulation, or statute of any sort.[147] In these states, the amendment process is a mystery. In addition, in all six of these states, the lawyer's oath is enforced for disciplinary purposes.[148] The lack of transparency in these states is problematic, and the language used in those states' amendments will need to be carefully crafted.

Rules of professional conduct have long eclipsed the lawyer's oath as the primary source for attorney regulation.[149] Even when a lawyer's oath is enforced, it is rare that the rules of professional conduct are not cited at the same time.[150] At first, it may be unclear why states continue to enforce lawyer's oaths for the purposes of attorney discipline when their rules of professional conduct are much more detailed and on point. However, some states turn to the lawyer's oath for attorney discipline when the rules of professional conduct are inadequate to reach the certain behavior.

For example, Delaware's rules of professional conduct require candor toward the tribunal under Rule 3.3 and prohibit lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation under Rules 8.1 and

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SUP. CT. RULES R. 41(h); ARK. RULES GOVERNING ADMISSION TO THE BAR R. 7(G); DEL. SUP. CT. RULES R. 54; GA. RULES GOVERNING ADMISSION TO THE PRAC. OF L. pt. B § 16; HAW. SUP. CT. RULES R. 1.5; IDAHO CODE § 3-201; KAN. STAT. ANN. Sup. Ct. Rules R. 726; MICH. COMP. LAWS Rules Concerning the State Bar R. 15, § 3; MO. ANN. STAT. R. 8.15; MONT. CODE ANN. § 37-61-207; NEB. REV. STAT. Neb. Ct. Rules § 3-128; NEV. REV. STAT. Nev. Sup. Ct. Rules R. 73; N.M. RULES GOVERNING ADMISSION TO THE BAR. R. 15-304; OHIO REV. CODE ANN. Sup. Ct. Rules for the Gov't of the Bar R. I(9)(A); R.I. GEN. LAWS Sup. Ct. Rules art. II, R. 8; S.C. CT. RULES R. 402(h)(3); TENN. SUP. CT. RULES R. 6, § 4; UTAH RULES OF PROF'L CONDUCT pmbl. [1]; W. VA. CODE Rules for Admission to the Prac. of L. R. 7.0; WIS. SUP. CT. RULES R. 40.15; WYO. STAT. ANN. Rules & Procs. Governing Admission to the Prac. of L. R. 504(a); D.C. CT. APP. RULES R. 46(l).

146. *See, e.g.*, Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 198–99 (1996).

147. *See infra* App. A; STATE BAR OF CAL., *supra* note 11; COLO. SUP. CT. OFF. OF ATT'Y REGUL. COUNS., *supra* note 8; RULES REGULATING THE FLA. BAR R. 3-4.7 (FLA. SUP. CT. 2015); IOWA S. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.4(6) (IOWA ATT'Y DISCIPLINARY BD. 2022); LA. SUP. CT. COMM. ON BAR ADMISSIONS, *supra* note 83; OR. STATE BAR, *supra* note 8. In addition, the Iowa Lawyer's Oath is not posted online by the courts, bar association, or otherwise.

148. *See* STATE BAR OF CAL., *supra* note 11; COLO. SUP. CT. OFF. OF ATT'Y REGUL. COUNS., *supra* note 8; RULES REGULATING THE FLA. BAR R. 3-4.7; IOWA S. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.4(6); LA. SUP. CT. COMM. ON BAR ADMISSIONS, *supra* note 83; OR. STATE BAR, *supra* note 8.

149. *See* HAZARD & DONDI, *supra* note 2, at 60; Andrews, *supra* note 2, at 50.

150. For example, the Maryland Bar mentioned violating the rules of professional responsibility while disbarring an attorney for violating the Maryland lawyer's oath in 2022. *See* Att'y Grievance Comm'n of Md. v. O'Neill, 271 A.3d 792, 815 (Md. 2022) ("By violating several rules of professional responsibility, Respondent did not fairly and honorably discharge the ethical duties, embodied in the oath, and required by all members of the Maryland bar. In the aggregate, Respondent's conduct warrants the ultimate sanction of disbarment.").

8.4.[151] Yet, the Supreme Court of Delaware disbarred an attorney who had been previously suspended for misrepresentation and deceit to the Board on Professional Responsibility.[152] In that case, the attorney did not lie to a "tribunal" but was found to have lied to the Board on Professional Responsibility on his reinstatement questionnaire submitted when he was seeking restoration of his suspended law license. That was after he had already been suspended by the Board on Professional Responsibility for violating Rules 8.1(a) and 8.4 (b) and (d).[153] The Delaware Supreme Court found that the attorney's ongoing misrepresentation and deceit was so aggravated that he no longer possessed the requisite moral character required by the lawyer's oath and subsequently disbarred the attorney while citing to the Delaware oath.[154]

In other cases, courts inexplicably opt to enforce their lawyer's oath rather their rules of professional conduct. In *Kalil's Case*, the New Hampshire Supreme Court suspended an attorney for three months for failing to honor a statement in the lawyer's oath that promised that lawyers "will do no falsehood, nor consent that any be done in the court."[155] That court held that not only did the attorney "act unprofessionally by attempting to intimidate a pro se litigant outside the courtroom, he abandoned his oath by lying about his conduct when questioned by the judge."[156] The attorney in that case did not contest violations of Rules 3.3, 4.4, and 8.4, but challenged the severity of the penalty, a three month suspension.[157] In its decision, the New Hampshire court relied on the lawyer's oath instead of the rules of professional conduct, almost inexplicably. Again, just like the Delaware court, the New Hampshire court emphasized the aggravated fundamental nature of the violation and chose to discipline the attorney for violating the lawyer's oath.[158]

The majority of the time, when a court relies upon the oath in attorney disciplinary proceedings, it also references the rules of professional conduct and sometimes other ethical guidance.[159] For example, the Florida Supreme Court in *In re Code for Resolving Professionalism Complaints* stated that

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151. DEL. LAWS.' RULES OF PROF'L CONDUCT R. 3.3, 8.1, 8.4.

152. *In re* Davis, 43 A.3d 856, 865–66 (Del. 2012).

153. *Id.*

154. *Id.* ("When there can be no reliance upon the word or oath of a party, he is, manifestly, disqualified, and, when such a fact satisfactorily appears the court[s] not only have the power, but it is their duty to strike the party from the rol[l] of attorneys.").

155. *In re* Kalil's Case, 773 A.2d 647, 648–49 (N.H. 2001).

156. *Id.*

157. *Id.* at 648.

158. *Id.*

159. *See, e.g.*, Att'y Grievance Comm'n of Md. v. O'Neill, 271 A.3d 792, 815 (Md. 2022); *In re* Swier, 939 N.W.2d 855, 869, 874 (S.D. 2020); Joiner v. Joiner, 2005 WL 2805566, at *4 (Tenn. Ct. App. 2005); *In re* Giardine, 392 P.3d 89, 97 (Kan. 2017); State *ex rel.* Couns. for Discipline v. Sipple, 660 N.W.2d 502, 511 (Neb. 2003); White v. Priest, 73 S.W.3d 572, 581 (Ark. 2002); *In re* Huddleston, 974 P.2d 325, 330 (Wash. 1999); *In re* Breslow, 590 A.2d 1185, 1186–87 (N.J. 1991).

> Members of The Florida Bar shall not engage in unprofessional conduct. "Unprofessional conduct" means substantial or repeated violations of the Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court. Unprofessional conduct, as defined above, in many instances will constitute a violation of one or more of the Rules of Professional Conduct.[160]

In this case, the Court lumped the oath in together with all the ethical guidance that could apply. The Florida Supreme Court did not specify which provisions of the oath applied and how those provisions differed from the obligations in Florida's rules of professional conduct or other sources of ethical guidance. In "throwing the book" at the respondent, the court appears to have been reminding the respondent of all of the various professional obligations undertaken when an attorney is admitted to practice law.

States, therefore, enforce lawyer's oaths for attorney disciplinary purposes primarily in conjunction with and indistinguishable from the rules of professional conduct. Sometimes, courts reference oaths when the rules of professional conduct do not quite capture the behavior in question, and other times, it is unclear why courts look to their state's lawyer's oath. This observation is not particularly helpful in determining what amendments to lawyer's oaths should look like in states that enforce the lawyer's oath for attorney disciplinary purposes, except to note that lawyer's oaths are enforceable in many states. It will thus continue to be important to clearly differentiate aspirational language in the lawyer's oath from language that could be enforced.

IV. HOW TO USE HUMAN RIGHTS NORMS TO UPDATE LAWYER'S OATHS

Human rights norms can provide attorneys with ethical aspiration and guidance.[161] Human rights are not limited to laws and legal systems; human rights can also be tools and aspirations; they can represent particular norms, and provide guidance in decision making.[162] Human rights also represent a vision of a future in which one would want to live and work.[163] Human rights are centered on the values of respect for human dignity[164] and non-discrimination.[165] In addition,

160. *In re* Code for Resolving Professionalism Complaints, 116 So.3d 280, 282 (Fla. 2013).

161. *See* Bartlett, *supra* note 20, at 583–88; Martha F. Davis, *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 COLUM. HUM. RTS. L. REV. 157, 180 (2010).

162. Bartlett, *supra* note 20, at 583–88; *see also, e.g.*, U.N. Charter art. 1, ¶ 3; Davis, *supra* note 161, at 180.

163. Bartlett, *supra* note 20, at 584.

164. *See* Davis, *supra* note 161, at 157 (quoting DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 65–95 (2007)); *see also* Risa Kaufman, *"By Some Other Means": Considering the Executive's Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971, 2007 (2012) ("A common set of standards comprise the concept of human rights: dignity, justice, fairness, and equality."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (UDHR), art. 7 (Dec. 10, 1948) [hereinafter UDHR].

165. Davis, *supra* note 161, at 178.

lawyers and scholars have identified self-determination,[166] privacy,[167] accountability,[168] and participation[169] as human rights norms that can help guide an attorney's work and representation of clients. Additionally, there are important human rights norms related to building an inclusive legal profession including cultural sensitivity,[170] accountability for human rights violations,[171] and access to justice.[172]

Professor Martha F. Davis has explained that human rights "are relevant to legal ethics both as means, informing the contours of lawyer-client relationships, and as ends, informing legal goals and decision making."[173] Attorneys drawing on human rights for aspiration will find guidance for navigating ethical dilemmas in law practice and can provide moral direction for the legal profession.[174] As I have noted elsewhere, the negative phrasing of the *Model Rules* provides a baseline and a line that should not be crossed, but the *Model Rules* do not do a great job of providing aspirational goals or ideals.[175] In stark contrast, human rights emphasize respect for human dignity (e.g., rights to self-determination, privacy, non-discrimination), directing attorneys and law students to reach up and aspire

166. International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, 993 U.N. T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR] ("All peoples have the right of self-determination.").

167. Bartlett, *supra* note 20, at 589; *see also* Mark S. Ellis, *Developing a Global Program for Enhancing Accountability: Key Ethical Tenets for the Legal Profession in the 21st Century*, 54 S.C. L. REV. 1011, 1021 (2003) (discussing the principle of confidentiality as a universal principle of ethical behavior in the legal profession both in the United States and abroad).

168. Bartlett, *supra* note 20, at 589; UDHR, *supra* note 164, at art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

169. Bartlett, *supra* note 20, at 589; UDHR, *supra* note 164, at art. 21, 27.

170. *See* UDHR, *supra* note 164, at art. 27; ICESCR, *supra* note 166, at pmbl.

171. *See* UDHR, *supra* note 164, at art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); Organization of American States, American Convention on Human Rights, art. 25, Nov. 22 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, ("Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.").

172. American Convention on Human Rights, *supra* note 171, at art. 25; Martha F. Davis, Risa Kaufman, and Heidi M. Wegleitner, *The Right to Adequate Housing in the United States: The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772, 777 (2014) (discussing access to justice as a human right, specifically stating that "[l]egal representation is fundamental to safeguarding fair, equal, and meaningful access to the legal system as a whole, and is critical to safeguarding other human rights").

173. Davis, *supra* note 161, at 176; *see* Caroline Bettinger-Lopez, Davida Finger, Meetali Jain, JoNel Newman & Sarah Paoletti, *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. POVERTY L. & POL'Y 337, 384 (2011) (describing a proposal by a law student in the Columbia Human Rights Clinic that suggests adopting eleven principles to guide the ethical behavior of international human rights lawyers).

174. *See* Bartlett, *supra* note 20, at 583–88.

175. *See id*. at 588.

to high moral and ethical integrity in their interactions with each other, with courts, and with their clients.[176]

Drawing on human rights norms to update lawyer's oaths also makes sense in this increasingly globalized world. A growing number of law students and lawyers are familiar with international law and human rights,[177] and thus much of legal practice today is transnational.[178] In addition, domestic laws in the United States are increasingly influenced by human rights.[179] Given the globalized nature of law practice, legal ethics—and lawyer's oaths in particular—should not stand out as separate from human rights.

Yet, as it stands, no lawyer's oath in the United States currently contains the words "human rights." A few lawyer's oaths come close. The Ohio, Colorado, and West Virginia lawyer's oaths stand out by specifically requiring a promise to respect *all* persons.[180] Similarly, the Hawaii lawyer's oath includes a pledge to give "due consideration to the legal needs of those without access to justice."[181]

A handful of lawyer's oaths require attorneys to pledge to maintain the dignity of the profession,[182] maintain the dignity of the legal system,[183] or to conduct themselves with dignity.[184] While these pledges use the word dignity, and human

176. *See* Davis, *supra* note 161, at 157, 178; Bartlett, *supra* note 20, at 588–89.

177. *See* Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 507 (2003); Davis, *supra* note 161, at 174; Bettinger-Lopez, Finger, Jain, Newman & Paoletti, *supra* note 173, at 337. In the past, Georgetown Law even required that first year students take an international law course. *See* Farida Ali, *Globalizing the U.S. Law School Curriculum: How Should Legal Educators Respond?*, 41 INT'L J. LEGAL INFO. 249, 266 (2013).

178. Transnational law was famously defined by Philip Jessup as "all law which regulates actions or events that transcend national frontiers." Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 750 (2006) (arguing that "transnational law will loom so large in our future"); STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (2015) (discussing cases before the Supreme Court of the United States that increasingly consider foreign activities and international law).

179. *See* Tamar Ezer, *Localizing Human Rights in Cities*, S. CAL. REV. L. & SOC. JUST. 68 (2022) ("[C]ities throughout the world have espoused international human rights in various forms. This development has also caught on in the United States with close to a dozen self-designated human rights cities."); *see also* INDIA THUSI & ROBERT L. CARTER, HUMAN RIGHTS IN STATE COURTS 5–6, 47 (2016) (reviewing U.S. state court decisions and Attorney General opinions interpreting human rights treaties, laws, and standards).

180. The Colorado lawyer's oath states, in part, "I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty." COLO. SUP. CT. OFF. OF ATT'Y REGUL. COUNS., *supra* note 8. The Ohio lawyer's oath states, in part, "I will conduct myself with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons." OHIO REV. CODE ANN. Sup. Ct. Rules for the Gov't of the Bar R. I(9)(A). The West Virginia lawyer's oath states, in part, "I will conduct myself with integrity, dignity and civility and show respect toward judges, court staff, clients, fellow professionals and all other persons." W. VA. CODE Rules for Admission to the Prac. of L. R. 7.0.

181. HAW. SUP. CT. RULES R. 1.5.

182. Alaska and Montana require attorneys to pledge to maintain the dignity of the profession. ALASKA BAR RULES R. 5 § 3; MONT. CODE ANN. § 37-61-207.

183. The South Carolina lawyer's oath requires lawyers to maintain the dignity of the legal system. S.C. CT. RULES R. 402(h)(3).

184. The California, Hawaii, Missouri, and Ohio lawyer's oaths require attorneys to conduct themselves with dignity. *See* STATE BAR OF CAL., *supra* note 11; HAW. SUP. CT. RULES R. 1.5; MO. ANN. STAT. R. 8.15; OHIO REV. CODE ANN. Sup. Ct. Rules for the Gov't of the Bar R. I(9)(A).

rights norms are centered on respect for human dignity, a pledge to respect human dignity is different than a pledge to maintain the dignity of the profession. These pledges to maintain the dignity of the profession and maintain the dignity of the legal system are not unlike the civility pledges discussed above and may be a veiled attempt to exclude certain groups.[185]

Globally, there are lawyer's oaths which include human rights and can serve as models. For example, the Oath of an Advocate from the country of Georgia provides (in its entirety): "I swear to be loyal to the ideas of justice, carry out an advocate's duties in good faith, and protect the Constitution and the laws of Georgia, the code of professional ethics of advocates, and the human rights and freedoms!"[186]

Lawyer's oaths in the United States could include a similar pledge to uphold or protect human rights, which would in turn evoke a broad swath of ethical principles.[187]

Given that some U.S. states may bristle at a pledge to uphold human rights,[188] another suggestion for updating lawyer's oaths would be to include human rights norms without referring directly to human rights. For example, the oath taken by lawyers in France states (in its entirety): "I swear, as a lawyer, to perform my duties with dignity, conscience, independence, integrity, and humanity."[189]

This brief oath puts respect for dignity and humanity, core human rights norms, at the center of the lawyer's professional duties. This is also not too far afield from the new pledge in the West Virginia lawyer's oath to "conduct myself with integrity, dignity and civility."[190] Other states should be open to similar amendments of their oaths.

Thus, human rights can and do provide a source for aspirational language to be used when updating lawyer's oaths. Human rights updates to lawyer's oaths take various forms. It is clear, however, that lawyer's oaths updated with aspirational human rights language can be a useful tool to build a dignified, respectful, and inclusive legal profession.

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185. *See supra* Part II.D.

186. The Council of Bars and Law Societies of Europe ("CCBE") has translated the Georgia Oath of an Advocate into English. *See* LAW OF GEOR. ON THE ADVOCS., art. 21[1] Oath of an Advocate (17.11.2009 N 2040) (COUNCIL OF BARS & L SOC'IES OF EUR. trans.), https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/National_Laws_on_the_Bars/EN_Georgia_The-Law-of-Georgia-on-Advocates.pdf [https://perma.cc/84AR-D2XD]. The Georgia oath also stands out as including an exclamation point, a good idea to emphasize the excitement that should be brought about by taking the oath. *See id.*

187. Davis, *supra* note 161, at 183.

188. For years, there has been an anti-international law movement afoot in the United States. *See, e.g.*, Martha F. Davis & Johanna Kalb, *Oklahoma State Question 755 and an Analysis of Anti-International Law Initiatives*, AM. CONST. SOC. ISS. BRIEF 1–2 (Jan. 2011), https://www.acslaw.org/wp-content/uploads/2018/04/davis_and_kalb_anti-international_law.pdf [https://perma.cc/AF69-UHNK].

189. *Professional Regulations – Obligations*, CONSEIL NATIONAL DES BARREAUX, https://www.cnb.avocat.fr/en/professional-regulations-obligations [https://perma.cc/8GEB-ACSK] (last visited Feb. 27, 2023).

190. W. VA. CODE Rules for Admission to the Prac. of L. R. 7.0.

V. PROPOSED HUMAN RIGHTS UPDATES TO LAWYER'S OATHS

There are many possibilities for updates to lawyer's oaths. Some oaths could be impactful with only minor updates—the addition or subtraction of just a word or two. Other oaths should be completely overhauled to achieve relevancy and accessibility for new attorneys. This Part proposes minor updates to the Ohio, Missouri, and California lawyer's oaths and a model human rights lawyer's oath that could entirely replace some outdated lawyer's oaths.

The proposals for updating lawyer's oaths offered here focus on making the oaths more accessible and impactful as tools for promoting professionalism and legal ethics—to build a dignified, respectful, and inclusive legal profession. To make oaths more accessible and impactful, the updates draw on human rights norms and focus on including: (1) simple, direct, and modern language; (2) a promise to abide by the rules of professional conduct; and (3) aspirational guidance for fulfilling the lawyer's role as a public citizen.

First, updates to make lawyer's oaths more accessible should focus on simple, direct, and modern language.[191] For example, "I promise" should be used instead of "I affirm" or "I swear."[192] All archaic language and activities, such as "lucre" and "duels," should be removed from lawyer's oaths,[193] and all gender-specific language, such as "delay no man," should be removed from lawyer's oaths.[194]

Second, to make a lawyer's oath more impactful, all lawyer's oaths should include a promise to abide by the rules of professional conduct. Adding a promise to abide by the rules of professional conduct seemingly negates the need to highlight specific ethical rules, such as due diligence or confidentiality. Many current lawyer's oaths emphasize only one or two ethical rules, thereby diminishing the importance of the other rules.[195] In addition, a promise to uphold all the rules of professional conduct, and not just specific rules, allows the lawyer's oath to focus on aspirational ethical guidance. Including human rights—such as non-discrimination, respect for all persons, and access to justice—in lawyer's oaths would accomplish this goal of focusing on aspirational ethical guidance.

Third, language providing aspirational guidance for fulfilling the lawyer's role as a public citizen with a special responsibility for the quality of justice should be prioritized.[196] Adding promises to give consideration to access to justice for all

191. *See supra* Part I; *cf.* Andrews, *supra* note 2, at 60 ("Simplicity does not mean a better oath.").

192. *See supra* Part II.E.

193. *See* Part II A. Connecticut replaced the word "lucre" with "gain" in its lawyer's oath. *See* CONN. GEN. STAT. § 1-25. South Carolina replaced the word "lucre" with "profit" in its lawyer's oath. *See* S.C. CT. RULES R. 402.

194. *See, e.g.*, ME. STAT. tit. 4, § 806.

195. *See, e.g.*, CAL. RULES OF CT. R. 9.7 (emphasizing only due diligence); DEL. SUP. CT. RULES R. 54 (emphasizing fidelity to the courts and client, due diligence, and no falsehood or delay); 705 ILL. COMP. STAT. ANN. 205/4 (emphasizing only due diligence); MD. CODE ANN., BUS. OCC. & PROF. § 10-212 (emphasizing only fair and honorable conduct).

196. *See supra* Part I.B.

and/or to improve the law and legal systems gives newly admitted lawyers specific aspirational goals. Goal setting language can not only provide guidance and help attorneys strive for high ethical aspiration, it can also emphasize the importance of reflection in their work and for the legal profession as a whole.[197]

Below, proposals for updates to the Ohio, Missouri, and California lawyer's oaths are discussed and explained. Enforceability and other concerns are also addressed in context. The proposed updates steer away from directly mentioning human rights and instead pull human rights language from other states' lawyer's oaths, to make the updates as friendly as possible for the state bar associations, supreme court committees, and others in charge of drafting and enacting updates to lawyer's oaths.

A. PROPOSED AMENDMENTS TO THE OHIO LAWYER'S OATH

The Ohio lawyer's oath is probably the best example of a lawyer's oath in the United States that already includes many of the updates recommended in this Article. New lawyers currently take the following oath in Ohio:

> I, _____, hereby (swear or affirm) that I will support the Constitution and the laws of the United States and the Constitution and the laws of Ohio, and I will abide by the Ohio Rules of Professional Conduct. In my capacity as an attorney and officer of the Court, I will conduct myself with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons. I will honestly, faithfully, and competently discharge the duties of an attorney at law. (So help me God.)[198]

The language in the Ohio lawyer's oath is already simple, direct, and modern. The language in this oath is also gender neutral and already requires a pledge to abide by the rules of professional conduct and to show respect towards all other persons. The only updates left are to take out the reference to the constitutions, add in a promise instead of swearing or affirming the oath, and emphasize the lawyer's role as a public citizen. Therefore, the proposed updated Ohio lawyer's oath would be refined to state:

> I promise to abide by the Ohio Rules of Professional Conduct. I will strive to conduct myself with dignity and show respect toward judges, court staff, clients, fellow professionals, and all other persons. I will give due consideration to safeguarding fair, equal, and meaningful access to justice for all.

This updated version of the Ohio lawyer's oath is quite similar to the current Ohio oath and the proposed updated California lawyer's oath below. The first sentence of the proposed updated Ohio lawyer's oath replaces the words "(swear or affirm)" with a "promise." The phrase "[i]n my capacity as an attorney and

197. *See supra* Part I.E.

198. OHIO REV. CODE ANN. Sup. Ct. Rules for the Gov't of the Bar R. I(9)(A).

officer of the Court" has been removed from the second sentence, as that limitation could be interpreted as a requirement for attorneys to conduct themselves with dignity only when acting as an officer of the court and not at all times. The requirement to conduct oneself with "civility" has also been removed from that sentence in solidarity with arguments that requiring civility may be an under-handed way of trying to control or exclude persons with disabilities, people of color, and women.[199]

The word "strive" has been added to the second sentence in an attempt to avoid enforceability issues, as the Ohio oath is enforceable for the purposes of attorney discipline.[200] The third and final sentence of the updated Ohio lawyer's oath has been added to emphasize the right of access to justice and the lawyer's role as a public citizen. That last sentence contains the same language that is proposed below as an addition to California's lawyer's oath. After these suggested amendments, the Ohio oath will read nearly like the proposed amended California oath below, and it will focus on highlighting the rules of professional conduct, aspirational ethical guidance, and the concept of lawyer as public citizen.

B. PROPOSED AMENDMENTS TO THE MISSOURI LAWYER'S OATH

In Missouri, new attorneys take this oath:

> I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Missouri;
>
> That I will maintain the respect due courts of justice, judicial officers and members of my profession and will at all times conduct myself with dignity becoming of an officer of the court in which I appear;
>
> That I will never seek to mislead the judge or jury by any artifice or false statement of fact or law;
>
> That I will at all times conduct myself in accordance with the Rules of Professional Conduct; and,
>
> That I will practice law to the best of my knowledge and ability and with consideration for the defenseless and oppressed.
>
> So help me God.[201]

The current Missouri lawyer's oath amounts to an almost perfect mixture of language from the California and Ohio oaths. The Missouri oath contains good language regarding dignity and already requires a pledge to abide by the rules of professional conduct. However, the Missouri oath contains some outdated language, such as "artifice," and could use some aspirational ethical guidance.

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199. *See supra* Part II.D.
200. *See* Off. of Disciplinary Couns. v. Fowerbaugh, 658 N.E.2d 237, 239–40 (Ohio 1995); *infra* App. A.
201. MO. ANN. STAT. R. 8.15.

The proposed updated Missouri lawyer's oath would be simplified and state:

> I promise that I will show respect toward all others and will at all times conduct myself with dignity;
>
> That I will at all times conduct myself in accordance with the Rules of Professional Conduct; and
>
> That I will give due consideration to safeguarding fair, equal, and meaningful access to justice for all.

This updated version of the Missouri lawyer's oath is almost identical to the proposed updated Ohio and California oaths, just slightly reordered based on the order of the current Missouri oath. The first sentence of the proposed updated Missouri oath replaces the words "I do solemnly swear" with "I promise" and the pledges upholding constitutions are removed. The second sentence of the current oath is amended to highlight showing respect for all others at all times, as opposed to respect for just courts and officers of the court. The current sentence regarding the rules of professional conduct is unaltered in the proposed updated Missouri oath. The last sentence mirrors the final sentence of the proposed updated Ohio oath, emphasizing the lawyer as public citizen. Because Missouri does not enforce its oath for the purposes of attorney discipline, the word "strive" is not used here. The result is a much shorter oath. These proposed amendments are meant to mirror language already adopted by other states and are meant to highlight what is most important in terms of ethics and professionalism during the ceremony of admission.

C. PROPOSED AMENDMENTS TO THE CALIFORNIA LAWYER'S OATH

Newly admitted attorneys to the California Bar currently take the following lawyer's oath:

> I solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability. As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.[202]

The California oath already includes the core human rights norm of dignity. In addition, this oath requires attorneys to act *at all times* with dignity, instead of limiting the requirement to act with dignity only to interactions with a subset of people, such as the judge or clients, as some other lawyer's oaths do. However, the California oath only requires acting with dignity when the attorney is performing duties as an officer of the court, which does not fully embrace the lawyer as public citizen principle. There is also no mention in the current California oath

202. STATE BAR OF CAL., *supra* note 11.

of the rules of professional conduct, access to justice, or any special responsibility for the quality of justice.

Proposed amendments to the California oath, therefore, focus on adding a promise to abide by the rules of professional conduct and highlight the human rights norms of non-discrimination and access to justice. The proposed updated California lawyer's oath would read:

> I promise to abide by the California Rules of Professional Conduct. I will strive to conduct myself at all times with dignity and integrity. I will strive to show respect toward judges, court staff, clients, fellow professionals, and all other persons. I will give due consideration to safeguarding fair, equal, and meaningful access to justice for all.

The first sentence of this proposed oath replaces the words "swear (or affirm)" with a "promise." A promise is simpler and more modern than swearing or affirming and avoids possible religious discrimination.[203] The sentence regarding support for the constitutions has also been removed in this proposed oath.

The first sentence adds a promise to abide by the rules of professional conduct, which should always be included in a lawyer's oath. The second sentence focuses on ethical aspiration—dignity and integrity—drawn from human rights norms.

The third proposed sentence is the last sentence of the current oath, but with the limiting language of "as an officer of the court" removed. That limitation could be interpreted to mean it requires you to conduct yourself with dignity only when acting as an officer of the court, instead of at all times. If professionalism and high ethical aspiration are goals, it would be best for attorneys to strive to conduct themselves with dignity at all times, as opposed to just when carrying out duties as an attorney.

The word "strive" is added to the second and third sentences to indicate that these are aspirational provisions, and not meant to be enforced, taking into consideration that the California oath is enforceable by statute.[204] The third proposed sentence emphasizes respect for all persons and draws on language contained in the current Ohio, Colorado, and West Virginia lawyer's oaths.

The fourth and last sentence proposed for the updated California lawyer's oath emphasizes the right to access to justice and the lawyer's role as a public citizen. This last sentence is close to the language in Hawaii's oath requiring a promise to give "due consideration to the legal needs of those without access to justice."[205] It is also not so different from the phrase, "never reject, from any consideration personal to myself, the cause of the defenseless or oppressed," which shows up in lawyer's oaths in ten states.[206] However this language is also borrowed from an

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203. *See supra* Part II.E.

204. *See infra* App. A; STATE BAR OF CAL., *supra* note 11.

205. *See* HAW. SUP. CT. RULES R. 1.5.

206. *See infra* App. A; COLO. SUP. CT. OFF. OF ATT'Y REGUL. COUNS., *supra* note 8; FLA. STAT. Oath of Admission to The Florida Bar; IDAHO CODE § 3-201; IND. CODE tit. 34, R. 22; LA. SUP. CT. COMM. ON BAR

article by Professor Martha F. Davis and others discussing access to justice as a human right, which states that "[l]egal representation is fundamental to safeguarding fair, equal, and meaningful access to the legal system as a whole, and is critical to safeguarding other human rights."[207]

While California's oath already contains more modern and direct language than many other lawyer's oaths, these updates would make the oath even more accessible and impactful.

D. PROPOSED MODEL HUMAN RIGHTS LAWYER'S OATH

While the proposed updated lawyer's oaths above draw on human rights norms, those proposed oaths do not directly reference human rights. The model human rights lawyer's oath offered below references human rights directly, giving jurisdictions that have already embraced human rights in other contexts the option of going above and beyond. The proposed model human rights lawyer's oath reads as follows:

> I promise to abide by the rules of professional conduct.
>
> I will strive to treat all persons with dignity and respect at all times.
>
> I promise to take action to ensure the full realization of human rights and fundamental freedoms for all.[208]

This model human rights lawyer's oath includes a promise to abide by the rules of professional conduct, just like the proposed updates to the California, Ohio, and Missouri oaths above. The second sentence of the model human rights oath centers the human rights norms of the rights to dignity and respect at all times for all persons.

The last sentence includes a promise to take action to protect and enforce human rights for all. This last sentence is a human rights version of the lawyer as public citizen provisions included in the proposed updates to the California, Ohio, and Missouri oaths. Instead of invoking the Colorado and Hawaii oath language, the model human rights lawyer's oath cites directly to human rights and urges newly admitted attorneys to embrace ambitious ethical aspirations. This model human rights lawyer's oath is short but still emphasizes the lawyer's role as a public citizen and includes simple, direct, and modern language, as well as a promise to abide by the rules of professional conduct.

ADMISSIONS, *supra* note 83; MICH. COMP. LAWS Rules Concerning the State Bar R. 15, § 3; N.M. RULES GOVERNING ADMISSION TO THE BAR. R. 15-304; S.D. CODIFIED LAWS § 16-16-18; WASH. REV. CODE § 2.48.210; WIS. SUP. CT. RULES R. 40.15.

207. *See* Davis, *supra* note 161.

208. Some of this language is taken from the United Nations Stand up for Human Rights Pledge. *See Stand Up for Human Rights Pledge*, UNITED NATIONS ASS'N, U.S., https://unausa.org/human-rights/take-the-pledge/ [https://perma.cc/SL82-Q9R4] (last visited Feb. 27, 2023).

CONCLUSION

Lawyer's oaths are an important tool for promoting professionalism and legal ethics. Yet, many lawyer's oaths used in the United States are problematic and include irrelevant, inappropriate, discriminatory, and obsolete language and terminology. In addition, many lawyer's oaths have not been amended for hundreds of years. It is past time to update lawyer's oaths. When considering updates to lawyer's oaths, the focus should be on simple, direct, and modern language. In addition, ethical aspiration and guidance, which may be drawn from human rights norms, should also be included. This Article can serve as a guide for jurisdictions considering updates to lawyer's oaths.

APPENDIX A: LAWYER'S OATH CHART (FIFTY STATES AND WASHINGTON, D.C.)

Enforceable by Statute	15	DC, WI, WA, SD, SC, NM, NE, MT, MN, KS, IA, ID, FL, CA, AZ
Enforceable (but not by statute)	12	UT, PA, OR, OH, NH, MA, ME, IL, DE, CT, CO, AR
Reference (but oath alone not enforced for attorney discipline)	17	WY, WV, VT, TN, RI, OK, NY, NV, NJ, ND, MS, MI, MD, LA, KY, IN, GA
No Reference (to oath violations used for attorney discipline)	7	VA, TX, NC, MO, HI, AL, AK

State	Status	Lawyer's Oath	Relevant Text/Source(s) for Enforceability
Alabama	No Reference	ALA. CODE § 34-3-15 (2022).	No reference to state lawyer's oath violations.
Alaska	No Reference	ALASKA BAR RULES R. 5 § 3 (Alaska Bar Ass'n 2018).	No reference to state lawyer's oath violations.
Arizona	Enforceable by Statute	ARIZ. SUP. CT. RULES R. 41 (ARIZ. SUP. CT. 2023).	ARIZ. SUP. CT. RULES R. 31(a)(2)(E), 41 (g), 54(i); *In re* Martinez, 462 P.3d 36, 43 (Ariz. 2020) ("The Bar contends that the panel erred by characterizing Rule 41(g) as aspirational. Although we do not interpret the panel's decision as applying an incorrect standard, we clarify that because unprofessional conduct is actionable under Rule 41(g), the rule is not merely aspirational.").

Arkansas	Enforceable	ARK. RULES GOVERNING ADMISSION TO THE BAR R. 7 (G) (Ark. Sup. Ct. 2017).	Wernimont v. State *ex rel*. Little Rock Bar Ass'n, 142 S.W. 194, 196 (Ark. 1911) ("The purpose of the proceedings for suspension and disbarment is to protect the court and the public from attorneys who, disregarding their oath of office, pervert and abuse those privileges which they have obtained by the high office they have secured from the court."); White v. Priest, 73 S.W.3d 572, 581 (Ark. 2002) ("We cite the foregoing examples of the general tone of disrespect for the code of ethics and Mr. Stilley's **breach of his oath of office** as an attorney-at-law. . . . Because this matter implicates a breach of the Model Rules of Professional Conduct, we refer Mr. Stilley to the Professional Conduct Committee and request the Committee to take whatever action it believes his actions warrant under the Model Rules of Professional Conduct." (emphasis added)).
California	Enforceable by Statute	*Attorney's Oath*, STATE BAR OF CAL. (2023), https://perma.cc/BMC5-9MQ3.	CAL. BUS. & PROF. CODE §§ 6068 (2019), 6103 (2023); CAL. RULES OF CT. R. 9.7 (JUD. COUNCIL OF CAL. 2022); Ramirez v. State Bar, 619 P.2d 399, 405 (Cal. 1980) ("It appears clear petitioner **has violated his oath and duties as an attorney and is subject to discipline therefor**. In support of the recommenced discipline, this court has heretofore disciplined attorneys for violating their oath and duties in making unjustified and demeaning allegations against judicial officers." (emphasis added)).

Colorado	Enforceable	*Oath of Admission*, COLO. SUP. CT. OFF. OF ATT'Y REGUL. COUNS., https://perma.cc/BH9T-8HQQ (last visited Mar. 3, 2023).	People v. Selby, 396 P.2d 598, 599 (Colo. 1964) ("Lawyers should ever remember that it is their duty to act with dignity, restraint and fairness in the hallowed process of seeking justice through our judicial system. Those who forget, or deliberately violate, this injunction **violate their oath and obligation as lawyers** and officers of the Court. Mr. Selby, you are . . . . solemnly warned that repetition of these violations or any other breach of your duty as a lawyer will be sufficient cause for more severe disciplinary action." (emphasis added)); People v. Wallin, 621 P.2d 330, 330 (Colo. 1981) ("Mr. Wallin, you stand before the Supreme Court of Colorado to be publicly **censured for violating your oath as an attorney**." (emphasis added)).

Connecticut	Enforceable	CONN. GEN. STAT. § 1-25 (2017).	Grievance Comm. v. Woolfson, 2 Conn. Supp. 122, 127, 134 (1935) ("The inquiry here is whether Woolfson has committed any unprofessional acts in **violation of his oath of office as an attorney**. . . . His offense may be characterized as 'sharp practice', a total lack of comprehension of the duty of a lawyer to the public in general, a failure to possess a full realization of the obligation owed by the attorney to the Court, a willingness to walk so close to the line separating right from wrong that the pressure of self-interest may temporarily cause a slipping to the side of wrong. The said Ralph G. Woolfson is suspended from the practice of law." (emphasis added)); Disciplinary Couns. v. Johnson, No. HHDCV126034033, 2021 WL 4295352, at *8 (Conn. Super. Ct. Aug. 30, 2021) ("The Respondent's conduct over a three-year period was in **violation of his oath as an attorney**, disrespectful to the trial court, unfair to and expensive for the other parties, and incompatible with well-established Connecticut law. The Respondent's frivolous and baseless pleadings confused the issues and obscured the true facts, delayed final resolution of both lawsuits, and significantly increased the costs to the opposing parties. In the face of such misconduct, this court is duty-bound to impose sanctions." (emphasis added)).

Delaware	Enforceable	DEL. SUP. CT. RULES R. 54 (DEL. SUP. CT. 2023).	*In re* Davis, 43 A.3d 856, 865–66 (Del. 2012) ("Notwithstanding this Court's adoption of the Delaware Lawyers' Rules of Professional Conduct, the oath remains the primary statement of core ethical values for Delaware lawyers. Two fundamental ethical principles in the Delaware oath are to act with fidelity to the Court and to use no falsehood. The record reflects that Davis violated these fundamental ethical principles before and during his suspension, and thereafter, when he sought reinstatement.").
Florida	Enforceable by Statute	FLA. STAT. Oath of Admission to The Florida Bar (2023).	RULES REGULATING THE FLA. BAR R. 3-4.7 (FLA. SUP. CT. 2015); *In re* Code for Resolving Professionalism Complaints, 116 So.3d 280, 282 (Fla. 2013) ("Members of The Florida Bar shall not engage in unprofessional conduct. 'Unprofessional conduct' means substantial or repeated violations of the Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court. Unprofessional conduct, as defined above, in many instances will constitute a violation of one or more of the Rules of Professional Conduct.").

Georgia	Reference	GA. RULES GOVERNING ADMISSION TO THE PRAC. OF L. pt. B § 16 (GA. SUP. CT. 2022).	Williford v. State, 194 S.E. 384, 388 (Ga. Ct. App. 1937) ("'An attorney **is guilty of misconduct whenever he so acts as to be unworthy of the trust and confidence involved in his official oath**, and is found wanting in the honesty and integrity which must characterize members of the bar in the performance of their professional duties.' . . . This may involve misconduct towards the court, misconduct towards a fellow attorney, or moral delinquency showing the attorney to be unfit to exercise the privilege of practicing before the courts." (citations omitted)).
Hawaii	No Reference	HAW. SUP. CT. RULES R. 1.5 (HAW. SUP. CT. 2023).	No reference to state lawyer's oath violations.
Idaho	Enforceable by Statute	IDAHO BAR COMM'N RULES R. 220 (BD. OF COMM'RS OF THE IDAHO STATE BAR 2023).	IDAHO CODE § 3-301 (2022) (replaced C.S. § 6578 in 1929); *In re* Downs, 268 P. 17, 17 (Idaho 1928) ("[A]n **attorney may be disbarred for 'any violation of the oath** taken by him or his duties as such attorney and counselor.' These duties are prescribed by C. S. § 6572, among others, to support the laws of this state and maintain the respect due to the courts of justice and judicial officers. C. S. § 6580, authorizes proceedings by this court for violation of C. S. § 6578, on matters within its knowledge or upon the information of another." (emphasis added)).

Illinois	Enforceable	705 ILL. COMP. STAT. ANN. 205/4 (2022).	*In re* Stillo, 368 N.E.2d 897, 899 (Ill. 1977); ("When a lawyer, further, converts a client's funds to his own personal use he commits an act involving moral turpitude, and, in the absence of mitigating circumstances, such conversion is a gross violation of the attorney's oath, calling for the attorney's disbarment." (emphasis added)).
Indiana	Reference	IND. CODE tit. 34, R. 22 (2023).	*In re* Helman, 640 N.E.2d 1063, 1065 (Ind. 1994) ("Every individual who has taken this Court's oath of attorneys should be aware that lying is, at best, an ethically irresponsible practice.").
Iowa	Enforceable by Statute	Available in Roxann Ryan, *Students Propose Statutory Changes in Iowa Lawyer's Oath*, IOWA LAW. 8 (May 2005), https://perma.cc/69DM-YQ66.	IOWA S. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.4(6) (IOWA ATT'Y DISCIPLINARY BD. 2022) ("A true copy of any complaint against a current member of the grievance commission or the disciplinary board involving alleged violations of an attorney's oath of office or of the Iowa Rules of Professional Conduct.").
Kansas	Enforceable by Statute	KAN. STAT. ANN. Sup. Ct. Rules R. 726 (2022).	KAN. STAT. ANN. Sup. Ct. Rules R. 203; *In re* Giardine, 392 P.3d 89, 97 (Kan. 2017) ("'Acts or omissions by an attorney . . . which **violate the attorney's oath of office** or the disciplinary rules of the Supreme Court shall constitute misconduct and shall be grounds for discipline, whether or not the acts or omissions occurred in the course of an attorney-client relationship.'" (emphasis added)).

Kentucky	Reference	KY. CONST. § 228.	*In re* Wells, 168 S.W.2d 730, 732 (Ky. 1943) ("An attorney is guilty of misconduct sufficient to justify his suspension or disbarment whenever he so acts as to be unworthy of the trust and confidence involved in his official oath and is found to be wanting in that honesty and integrity which must characterize members of the bar in the performance of their professional duties.").
Louisiana	Reference	*Lawyer's Oath*, LA. SUP. CT. COMM. ON BAR ADMISSIONS (2023), https://perma.cc/C2ZC-UYFS.	*In re* Morphis, 831 So. 2d 934, 940 (La. 2002) ("'High standards of honesty and righteousness have been erected for those engaged in the legal profession and all members of it are required to take an oath to uphold these ideals upon their admission to the Bar.' Respondent has disregarded and ignored his obligation to uphold the ideals that he assumed when he took the oath as a member of the bar of this state. He has used his law license not to foster the high standards of the profession, but as a license to steal from the citizens of Louisiana. This court cannot and will not tolerate such conduct. Respondent must be permanently disbarred." (citation omitted) (quoting La. State Bar Ass'n v. Haylon, 198 So. 2d 391, 392 (La. 1967))).

Maine	Enforceable	ME. STAT. tit. 4, § 806 (2023).	Strout v. Proctor, 71 Me. 288, 291 (1880) ("[R]espondent, prostituting to corrupt uses his professional standing and influence, and in violation of his official oath, by means of false pretenses and false advice to Mrs. Haskell, whom he knew was trusting him as a lawyer and a friend, did all in his power to consummate a gross wrong and fraud upon her, of which he himself, directly or indirectly, was to reap the benefit . . . requires the removal of Daniel W. Proctor from the office of attorney and counselor of this court."); *In re* Dineen, 380 A.2d 603, 604 (Me. 1977) ("The 'Attorney's Oath,' required of all Maine attorneys, includes several provisions against which an attorney's actions may be properly measured.").
Maryland	Reference	MD. CODE ANN., BUS. OCC. & PROF. § 10-212 (West 2022).	Att'y Grievance Comm'n of Md. v. O'Neill, 271 A.3d 792, 815 (Md. 2022) ("By violating several rules of professional responsibility, Respondent did not fairly and honorably discharge the ethical duties, embodied in the oath, and required by all members of the Maryland bar. In the aggregate, Respondent's conduct warrants the ultimate sanction of disbarment.").

Massachusetts	Enforceable	MASS. GEN. LAWS ch. 221, § 38 (2022).	*In re* Balliro, 899 N.E.2d 794, 804 (Mass. 2009) ("When the respondent was admitted as an attorney in this Commonwealth, she took an oath of office . . . in which she solemnly swore, among other things, that she would 'do no falsehood, nor consent to the doing of any in court.' . . . Notwithstanding the substantial mitigating factors in this case, we cannot condone the actions of an attorney in giving false testimony under oath, irrespective of the circumstances. We conclude that the appropriate disciplinary sanction for the respondent's misconduct is a six-month suspension from the practice of law."); *In re* Randall, 93 Mass. 473 (1865) ("The more reasonable inference is that the power of removal was given, not as a mode of inflicting a punishment for an offence, but in order to enable the courts to prevent the scandal and reproach which would be occasioned to the administration of the law, by the continuance in office of those who had violated their oaths or abused their trust, and to take away from such persons the power and opportunity of injuring others by further acts of misconduct and malpractice.").

Michigan	Reference	MICH. COMP. LAWS Rules Concerning the State Bar R. 15, § 3 (2023).	Grievance Adm'r v. Fieger, 719 N.W.2d 123, 134 (Mich. 2006) ("This oath provides that the lawyer will, upon being accorded the privileges provided by membership in the bar, (1) maintain the respect due to courts of justice and judicial officers, (2) abstain from all offensive personality, and (3) conduct himself or herself personally and professionally in conformity with the high standards of conduct imposed on members of the bar as conditions for the privilege to practice law in Michigan.").
Minnesota	Enforceable by Statute	MINN. STAT. § 358.07(9) (2023).	MINN STAT. § 481.15; *In re* Kennedy, 15 N.W.2d 26, 26 (Minn. 1944) ("Respondent's conduct clearly calls for censure and reprobation. It constitutes a wilful **violation of his oath and** of the duties imposed upon him as an attorney at law, justifying his removal or suspension under [§ 481.15]. It cannot be ignored." (emphasis added)).
Mississippi	Reference	MISS. CODE. ANN. § 73-3-35 (2023).	Rogers v. Miss. Bar, 731 So. 2d 1158, 1166 (Miss. 1999) ("The Rules of Discipline for the Mississippi State Bar state that the grounds for discipline include '[a]cts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office or the Code of Professional Responsibility as now set forth or as hereafter amended, shall constitute misconduct and shall be grounds for discipline, whether or not the acts or omissions occurred in the course of an attorney-client relationship.'" (emphasis removed)). (No other reference to enforcement of this rule found).

Missouri	No Reference	MO. ANN. STAT. R. 8.15 (2023).	No reference to state lawyer's oath violations.
Montana	Enforceable by Statute	*Written Oath of Admission to the Bar of the State of Montana*, MONT. SUP. CT. (2017), https://perma.cc/N4KT-TSDS.	MONT. CODE ANN. § 37-61-301 (2023); *In re* McCue, 261 P. 341, 347 (Mont. 1927) ("[Montana law] provides for disbarment for 'willful disobedience or violation of an order of the court, violation of the oath taken by [an attorney], or of his duties as such attorney.' Clearly, it is the duty of an attorney to remit money collected to his client, and a willful omission to do so constitutes a violation of his duty and will subject the attorney to punishment where no deceit is practiced.").
Nebraska	Enforceable by Statute	NEB. REV. STAT. Neb. Ct. Rules § 3-128 (2023).	NEB. REV. STAT. § 7-104 (2022) (does not expressly provide for discipline when violation of lawyer's oath occurs; however, case law seems to suggest Nebraska courts use it to enforce attorney conduct); State *ex rel*. Couns. for Discipline v. Sipple, 660 N.W.2d 502, 511 (Neb. 2003) ("Although the referee made no finding in this regard, we conclude that by virtue of respondent's conduct, we find by clear and convincing evidence that . . . respondent **has violated the attorney's oath of office**." (emphasis added) (citing NEB. REV. STAT. § 7-104)).
Nevada	Reference	NEV. REV. STAT. Nev. Sup. Ct. Rules R. 73 (2023).	*In re* Raggio, 487 P.2d 499, 501 (Nev. 1971) ("A member of the bar, however, stands in a different position by reason of his oath of office and the standards of conduct which he is sworn to uphold. Conformity with those standards has proven essential to the administration of justice in our courts.").

New Hampshire	Enforceable	N.H. REV. STAT. ANN. § 311:6 (2023).	*In re* Silverstein's Case, 236 A.2d 488, 490 (N.H. 1967) ("[A]n attorney is an officer of the court whose oath binds him to do no falsehood. The defendant's conduct was not of the high order which the public has the right to demand from members of the legal profession. . . . Jerome L. Silverstein [is] suspended from the practice of law for a period of three months." (citations omitted)); *In re* Kalil's Case, 773 A.2d 647, 648–49 (N.H. 2001) ("Every attorney admitted to practice law in this State takes an oath . . . . The oath begins: 'You solemnly swear or affirm that you will do no falsehood, nor consent that any be done in the court[.]' The respondent failed to honor this obligation. Not only did he act unprofessionally by attempting to intimidate a pro se litigant outside the courtroom, he abandoned his oath by lying about his conduct when questioned by the judge. . . . Accordingly, the respondent is suspended from the practice of law for three months." (citations omitted)).

New Jersey	Reference	N.J. STAT. ANN. § 2A:13-1 (2023).	*In re* Breslow, 590 A.2d 1185, 1186–87 (N.J. 1991) ("The most obvious difference, and the one that most clearly justifies differential treatment of the subjects of the two proceedings, is that at the time of his or her past delinquency, the bar applicant was not bound by the solemn oath taken by every attorney and by the strictures of our Rules of Professional Conduct, as every practicing lawyer is. That oath and those Rules cast a different light on otherwise-identical misconduct because the attorney, unlike the applicant, acts in contravention of standards to which he or she has knowingly and affirmatively acceded. The weight to be accorded proof of rehabilitation, then, varies, depending on whether the transgression occurs before or after admission and, beyond that, depending on the nature of the transgression itself.").
New Mexico	Enforceable by Statute	N.M. RULES GOVERNING ADMISSION TO THE BAR. R. 15-304 (N.M. SUP. CT. 2010).	N.M. STAT. ANN. § 36-2-18 (2023).
New York	Reference	N.Y. CONST. art. XIII, § 1.	*In re* Nearing, 229 N.Y.S.2d 567, 569 (N.Y. App. Div. 1962) ("[A]n appraisal of the character of the offender is the true guide, but the nature, seriousness and surrounding circumstances of his offense are most significant factors as indicia of what may be expected in the future. The attorney's attitude toward the obligations and duties implicit in taking the oath of office as an attorney is probably the most decisive factor in reaching a determination.").

North Carolina	No Reference	N.C. GEN. STAT. § 11-11 (2022).	No reference to state lawyer's oath violations.
North Dakota	Reference	N.D. CONST. art. XI, § 4.	*In re* Crum, 215 N.W. 682, 683 (N.D. 1927) (Where attorney at issue was Special Assistant Attorney General of the state of North Dakota, "[i]n a disbarment proceeding . . . . such evidence is ample proof of conduct violative of the oath of office of the attorney and of a willful violation of the duties of an attorney at law.").
Ohio	Enforceable	OHIO REV. CODE ANN. Sup. Ct. Rules for the Gov't of the Bar R. I(9)(A) (West 2023).	Off. of Disciplinary Couns. v. Fowerbaugh, 658 N.E.2d 237, 239–40 (Ohio 1995) ("A lawyer who engages in a material misrepresentation to a court or a pattern of dishonesty with a client violates, at a minimum, the lawyer's oath of office that he or she will not 'knowingly . . . employ or countenance any . . . deception, falsehood, or fraud.' . . . For the foregoing reasons, we order that respondent be suspended from the practice of law in the state of Ohio for six months." (citation omitted)).
Oklahoma	Reference	OKLA. STAT. tit. 5, ch. 1, app. 5, R. 1 (2023).	State Bar Comm'n. *ex rel.* Williams v. Sullivan, 131 P. 703, 707 (Okla. 1912) ("The oath which an attorney is required to take before being permitted to practice law in the courts of this state is not simply to be obedient to the Constitution and laws of the state, but to maintain at all times the respect due the courts of justice and judicial officers, and for a violation of these duties an attorney may be suspended or disbarred." (citation omitted)) (case decided before Rules of Professional Conduct enacted in Oklahoma).

Oregon	Enforceable	*Oath of Office for Admission to the Practice of Law in Oregon*, OR. STATE BAR, https://perma.cc/G3ZY-9KBH (last visited Mar. 3, 2023).	*In re* McKechnie, 330 P.2d 727, 728 (Or. 1958) ("The intentional violation of an Act designed to carry out the purposes of government itself, whether done with corrupt intent or not, conflicts with the moral duty of a citizen and most certainly violates the oath of an attorney taken to uphold the constitution and laws of the United States. The petitioner took such an oath and his violation of that oath subjects him to disciplinary action.").
Pennsylvania	Enforceable	42 PA. CONS. STAT. § 2522 (2022).	*In re* Schofield, 66 A.2d 675, 685 (Pa. 1949) ("We are unanimous in our conclusion that respondent's insubordination described above, constituted violation of his oath of office requiring punishment. The rule must therefore be made absolute. It is therefore ordered that respondent . . . appear for public reprimand and censure at the bar of his court."); *In re* Austin, 5 Rawle 191, 204 (Pa. 1835) ("Expulsion may be proper, where there has been no contempt at all; as in cases of brutality, drunkenness, and the whole circle of infamous crimes. . . . In fact the court may have recourse to both together, and there is no reason, therefore, why it should not be at liberty to proceed on the ground of unfitness, and waive the contempt. It is not doubted that any breach of the official oath is a valid cause, for proceeding for the former; for the man who **deliberately violates the sanctions of a lawful oath,** proves himself to be unworthy of further confidence; society has no other hold upon him." (emphasis added)).

Rhode Island	Reference	R.I. GEN. LAWS Sup. Ct. Rules art. II, R. 8 (2023).	Carter v. Kamaras, 478 A.2d 991, 992 (R.I. 1984) ("[K]eeping in mind the obligation placed upon a lawyer at the time he takes his oath, we are of the opinion that the respondent's actions are of a type that bring disrepute to the legal profession. . . . The respondent's conduct before the trial justice of the Family Court reflects upon his fitness to practice law and warrants the imposition of discipline.").
South Carolina	Enforceable by Statute	S.C. CT. RULES R. 402(h)(3) (S.C. JUD. BRANCH 2022).	S.C. CT. RULES R. 413(7)(a)(6); *In re* Craig, 352 S.C. 8, 10, 572 S.E.2d 278, 279 (2002) ("Respondent has also violated . . . [Rule 413(7)(a)(6)] (violating the Oath of Office taken upon admission to the practice of law).").

South Dakota	Enforceable by Statute	S.D. CODIFIED LAWS § 16-16-18 (2023).	S.D. CODIFIED LAWS § 16-19-32; *In re* Gorsuch, 75 N.W.2d 644, 649 (S.D. 1956) ("The purpose of the proceedings for suspension and disbarment is to protect the court and the public from attorneys who, disregarding their oath of office, pervert and abuse those privileges which they have obtained by the high office they have secured from the court."); *In re* Swier, 939 N.W.2d 855, 869, 874 (S.D. 2020) ("Moreover, the statutory oath for admission to become a licensed attorney in South Dakota . . . . is not a one-time obligation; '[e]ach day of an attorney's [professional] life demands that these requirements be met anew.' . . . Furthermore, Swier must submit an affidavit to this Court stating under oath that: 1. He has reviewed the Oath of Attorney and the Rules of Professional Conduct; 2. He fully recognizes that his conduct violated the Rules of Professional Conduct by which he is bound; 3. He pledges to devote every effort in his future practice to fully abide by the Rules of Professional Conduct and Oath of Attorney . . .").

Tennessee	Reference	TENN. SUP. CT. RULES R. 6, § 4 (TENN. SUP. CT. 2023).	Joiner v. Joiner, 2005 WL 2805566, at *4 (Tenn. Ct. App. 2005) ("Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office, the Rules of Professional Conduct of the State of Tennessee, or T.C.A. § 29-308, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship." (footnote omitted)) (This decision is not reported, and no other reference to the Oath was found.).
Texas	No Reference	TEX. GOV'T CODE ANN. § 82.037 (West 2021).	No reference to state lawyer's oath violations.
Utah	Enforceable	UTAH RULES OF PROF'L CONDUCT pmbl. [1] (2023).	*In re* Platz, 132 P. 390, 391 (Utah 1913) ("From the facts found by the referee it is concluded that the said Arthur A. Platz has violated his oath and his duties as an attorney and is morally unfit to be a member of the bar of this court and should be permanently disbarred therefrom.").

Vermont	Reference	VT. STAT. ANN. tit. 12, § 5812 (2023).	*In re* Jones, 39 A. 1087, 1091 (Vt. 1898) ("Fidelity to his client's interests, and honesty and frankness in dealing with the judge in regard to discharging a duty towards him and the state, required by law, are prime qualifications of every attorney,—made so by his oath of office. It is not contended that if these charges are to stand proven, and are such that the respondent is answerable for them, as an attorney, to this court, they do not demand suspension or disbarment. It matters not that his deception of the judge occurred when he was not acting as a member of the county court, nor in the trial of a cause. It occurred when he was discharging a duty imposed by law. . . . Judgment that said Joseph C. Jones is removed from the office of attorney at law and from the office of solicitor in chancery.").
Virginia	No Reference	VA. CODE ANN. § 54.1-3903 (2023).	No reference to state lawyer's oath violations.

Washington	Enforceable by Statute	WASH. REV. CODE § 2.48.210 (2023).	WASH. REV. CODE § 2.48.220; *In re* Huddleston, 974 P.2d 325, 330 (Wash. 1999) ("The oath requires attorneys to abide by the laws of Washington as well as the laws of the United States. Additionally, by taking the oath, attorneys pledge to abide by the Rules of Professional Conduct. **Violating the attorney's oath subjects an attorney to discipline**. . . . In this case, the hearing examiner concluded that Huddleston violated the Rules of Professional Conduct as well as several criminal statutes. By committing the crimes of theft and wire or mail fraud, Huddleston certainly violated his attorney's oath." (citations omitted)); *In re* Ballou, 295 P.2d 316, 319 (Wash. 1956) ("The discipline and punishment to be meted out to an attorney who violates his oath of office or canons of ethics is exclusively reserved to the supreme court; the degree of punishment is left to the discretion of this court.").
West Virginia	Reference	W. VA. CODE Rules for Admission to the Prac. of L. R. 7.0(c) (2022).	Comm. on Legal Ethics of W. Va State Bar v. Taylor, 437 S.E.2d 443, 447 (1993) ("The respondent's actions, or the lack thereof in this case, adversely reflect upon the respondent's ability to carry out and uphold the laws and ethics of this State. This type of deceitful misconduct by a lawyer will not be tolerated by this Court, as it is in direct contravention of the oath the respondent took when he became a member of the West Virginia Bar.").

Wisconsin	Enforceable by Statute	WIS. SUP. CT. RULES R. 40.15 (WIS. CT. SYS. 2022).	WIS. SUP. CT. RULES R. 20:8.4(g); *In re* Richter, 204 N.W. 492, 497 (1925) ("[T]he court finds that the respondent has been guilty of misconduct which justifies a revocation of his license . . . in that he did in said case advance facts prejudicial to the honor and reputation of . . . the plaintiff therein. . . . The advancement of such facts was not required by the justice of the cause, and the same was done by the respondent in violation of his oath as an attorney of this court. . . . It is the order and decree of this court that the license of the respondent . . . be and the same hereby is revoked, canceled, and annulled.").
Wyoming	Reference	WYO. STAT. ANN. Rules & Procs. Governing Admission to the Prac. of L. R. 504(a) (2023).	State Bd. of L. Exam'rs of Wyo. v. Brown, 77 P.2d 626, 631–32 (Wyo. 1938); ("The respondent's oath of office as an attorney and counselor at law is not only binding here . . . but everywhere. He cannot put it aside or renounce it at pleasure. It abides with him at all times and places, and he will be held responsible to this court for his misconduct as an attorney so long as his name continues on the roll; nor can he put himself in a position which will place him beyond the inherent power of this court to purify the bar of its unworthy members, and to keep its roster clean." (quoting People *ex rel.* Colo. Bar Ass'n v. Lindsey, 283 P. 593, 546 (Colo. 1929))).
Washington, D.C.	Enforceable by Statute	D.C. CT. APP. RULES R. 46(l) (D.C. CT. APP. 2021).	D.C. BAR RULES R. XI, § 2(b) (D.C. CT. APP. 2022).

AMERICANBARASSOCIATION

REPORT OF THE ABA TASK FORCE FOR AMERICAN DEMOCRACY

September 10, 2025

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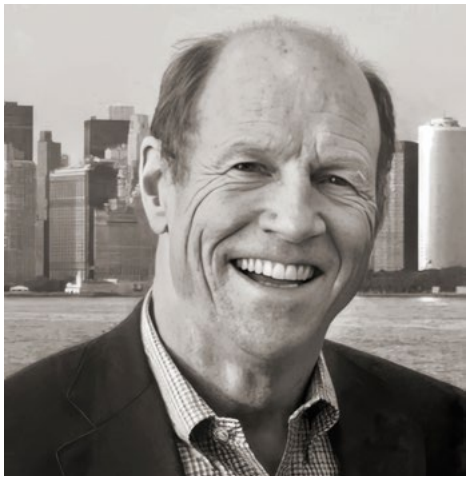
Steve Silverman (communications advisor)
Katherine S. Stewart (counsel)

This report is dedicated to the life and legacy of our Vice Chair Bill Ide, who was President of the ABA from 1993-1994. Bill passed away on July 8, 2025, just after we finalized the first draft of this report. This ABA Task Force For American Democracy was his vision and the final capstone on his remarkable career.



We are honored to have known Bill and carry on the principles he championed.

DISCLAIMER

The views expressed herein are those of the ABA Task Force For American Democracy. They have not been reviewed or approved by the ABA House of Delegates or the ABA Board of Governors. Accordingly, the views expressed herein should not be construed as representing the policy or position of the American Bar Association. Further, nothing herein should be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. These materials and any forms and agreements herein are intended for educational and informational purposes only.

Introduction by American Bar Association Past President, Mary L. Smith

For 237 years, America's Constitution has guided our country and defined us as a Nation of laws. When our democracy is tested, we draw strength from the Constitution as the bedrock, making our country more equal and more just for all our citizens. American democracy requires our constant care, vigilance, and full participation to determine the very future of our Nation.

In the last several years, we have seen our democracy stretched to the breaking point. The World Justice Project (WJP) ranked the United States 26th out of 142 countries and jurisdictions overall in its 2024 Rule of Law Index. This ranking indicates a decline in the U.S. rule of law, particularly in areas like government accountability and justice system accessibility.

Given this disturbing trend, two years ago, as I began my term as president of the American Bar Association (ABA), I surveyed the landscape of challenging issues facing our nation to determine how best to prioritize the work of the ABA during my tenure. I kept coming back to the single most important issue facing our country today: threats to democracy and the rule of law.

It is incumbent upon America's 1.3 million lawyers to play a central role in strengthening our democratic institutions. Lawyers must lead in reinforcing the rule of law, reinvigorating norms of the judicial process, and protecting election integrity. It is also imperative to protect those professionals and volunteers who make our election systems work. Finally, an important objective is to remind our next generation of lawyers of the vital role they need to play in our democracy.

To lead this effort, I asked highly respected former President of the American Bar Association, Bill Ide, to help create the Task Force for American Democracy. Two of America's foremost attorneys and public leaders, former Secretary of Homeland Security, Jeh Charles Johnson, and former federal judge, J. Michael Luttig, agreed to lead the Task Force, consisting of 30 distinguished Americans including thought leaders, lawyers, former elected officials and business leaders, among others. Collectively, the Task Force represents a bipartisan group of recognized national leaders with expertise in American government, democracy, and the rule of law. At the same time, another extraordinary group of attorneys began work as the Advisory Committee to the Task Force, led by Chair Carl Smallwood and Vice Chair Lauren Rikleen.

During its first year, the Task Force focused its efforts on instilling trust in our election system and educating the public about elections and civics. Accordingly, the Task Force began its work to mobilize lawyers across the country to help ensure an enduring democracy. Working with Secretaries of State like Brad Raffensperger (Georgia) and Jocelyn Benson (Michigan), the Task Force hosted Listening Sessions across the country to ensure confidence in our elections and the rule of law. Following the Listening

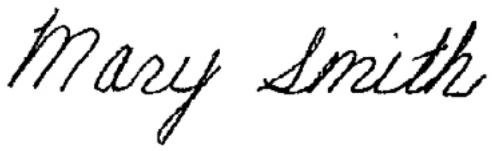
Sessions, the Task Force created Next Steps Committees in those communities to continue the work to educate the public and ensure fair elections. The Democracy Task Force had a wide-ranging impact through its reach across various media outlets, including cable TV. The Listening Sessions also reached thousands of people across several states, including Georgia, Michigan, and Pennsylvania, and helped to forge innovative coalitions of lawyers, election officials, NGOs, the media, and faith leaders to mobilize in their communities. Through these efforts, the Task Force created renewed energy among our citizens to bolster our democracy.

The current Report's recommendations on election reforms are the capstone of our first year of efforts, which focused on elections.

During the second year of the Task Force, our work has expanded from a focus on elections to supporting the rule of law more broadly. To further this objective, the Task Force is working closely with state, local, and affinity bar associations and coordinating with law schools. One example of our recent work and impact is the initiative for lawyers to reaffirm their oath of office on Law Day, May 1, 2025. This resulted in over 50 events around the country attended by over 10,000 people, including thousands of lawyers who reaffirmed their oaths to uphold the Constitution and the rule of law.

As indicated in the Report, an immense amount of work has gone into identifying the issues that are at the root of the challenges affecting our democracy, the way we engage with each other, and the rule of law. This massive, in-depth undertaking has engaged hundreds of people in the Task Force's activities. It has coordinated with dozens of outstanding NGOs engaged with these issues. Our mission to remind lawyers of our obligations to the Constitution and the rule of law and to protect democracy and elections is paramount at this critical time in our country's history.

I am eternally grateful to the Judge and the Secretary, Bill, our indefatigable volunteers and staff, each and every member of the Task Force and Advisory Committee, those who organized Listening Tour events, wrote white papers, coordinated volunteers, conducted research, and provided support in other meaningful ways. On a personal note, it was deeply gratifying to see people from diverse backgrounds come together with energy, warmth, intelligence, good humor, and passion to make a stand for our American way of life. We look forward to your thoughts and feedback as we set out on phase two of our work.



Mary Smith
Past President
American Bar Association
September 2025

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I. Introduction

Our American democracy is under threat. Many believe the rule of law is under threat, and that we are, in fact, in the midst of a constitutional crisis. Even the current administration must confess that it is determined to push the bounds of legal and constitutional norms.

The American electorate voted for this not once, but twice. Why do so many of us want such an extreme, unorthodox brand of leadership?

Stoked by false, overheated, and deeply partisan rhetoric from political opportunists, media outlets, and social media, Americans have become disillusioned and distrustful toward institutions of our democracy. This attitude is reflected broadly in polls. A 2023 Pew Research poll indicates only 4% of Americans say the political system is working "extremely or very well," 23% say it is working "somewhat well," and 63% have "not too much or no confidence at all" in the future of the U.S. political system.[1] A May 2024 Pew Research poll indicates that only 2% of the American public believes that the federal government does the right thing "just about always," and only 21% believe the federal government does the right thing "most of the time."[2] This is in stark contrast to a 1958 poll by Pew, indicating then that a full 75% of Americans trusted our federal government to do the right thing "almost always or most of the time."[3] Of greater concern, a 2023 survey reveals that approximately 38% of Americans support authoritarianism as a response to the direction of democracy in the United States,[4] and less than one-third of Millennials consider it essential to live in a democracy.[5] Large segments of the American population are drowning in conspiracy theories.

Many of our political leaders, in turn, pander to these sentiments to obtain and maintain elective office. Legislators at the federal and state levels represent gerrymandered districts drawn by politicians themselves. This incentivizes office holders to take extreme positions to survive challenges from the extreme right or left in party primaries.

Most alarming, political violence is on the rise. A year ago, there were two assassination attempts on then-presidential candidate

1 Pew Rsch. Ctr., Americans' Dismal Views of the Nation's Politics 5 (2023), https://www.pewresearch.org/politics/2023/09/19/americans-dismal-views-of-the-nations-politics.

2 *Public Trust in Government: 1958-2024*, PEW RSCH. CTR. (June 24, 2024), https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/.

3 *Id.*

4 Pub. Religion Rsch. Inst., Threats To American Democracy Ahead of an Unprecedented Presidential Election 5 (2023), https://www.prri.org/wp-content/uploads/2023/10/PRRI-Oct-2023-AVS.pdf.

5 *Reinventing American Democracy for the 21st Century*, Am. Acad. of Arts & Scis., https://www.amacad.org/news/reinventing-american-democracy-21st-century (last visited Aug. 27, 2025).

Donald Trump. In April 2025, a man pleaded guilty to attempting to assassinate Supreme Court Justice Brett Kavanaugh. On June 14, 2025, a well-known Minnesota state legislator and her husband were murdered by an assassin with a political manifesto.

What are the solutions to address this crisis?

This nonpartisan ABA Task Force was assembled in August 2023 by then-ABA president Mary Smith to "consider and propose solutions for educating our citizens on the importance of an inclusive, strong and enduring democracy and help to provide bulwarks to bolster our democracy as conceived." We were to deliver a final report with proposed solutions to the ABA at its annual meeting in August 2024. In light of the volatile 2024 election season, we postponed delivery of this report until now.

Twenty-three Task Force members have affirmatively signed on to this report.[6] This assembled group of distinguished Americans includes a broad swath of progressives and conservatives, lawyers and non-lawyers, former judges, former government officials, retired corporate CEOs, law professors, historians, and commentators. Not every signatory agrees with each and every recommendation offered, but each signatory agrees that we are at a perilous moment in our nation's history and that these recommendations must be part of the discussion of how we can better support and defend our democracy, the rule of law, and the Constitution.[7]

In developing this report and recommendations over the last two years, the Task Force found itself continually absorbed in one crisis after another, only to find out that our efforts to respond were OBE a week or a month later. Therefore, the Task Force has concluded that the most meaningful recommendations it can deliver are ones that address the

6 These signatories are: J. Michael Luttig (former federal appellate judge); Jeh Charles Johnson (former Secretary of Homeland Security); R. William Ide III (former ABA President); Danielle Allen (political philosophy, ethics, and public policy professor); Kenneth Chenault (former corporate CEO); James W. Crawford III (U.S. Navy Vice Admiral (retired)); Maria Echaveste (not-for-profit CEO and former deputy White House Chief of Staff); Kenneth Frazier (former corporate CEO); Richard A. Gephardt (former House Majority Leader); Jerry H. Goldfeder (Director of Fordham Law School Voting Rights and Democracy Project); Thomas B. Griffith (former federal appellate judge); Richard Haass (President Emeritus of the Council on Foreign Relations and author of The Bill of Obligations: The Ten Habits of Good Citizens); Stephen Heintz (foundation CEO and former Chief of Staff to U.S. Senator); Sherrilyn A. Ifill (civil rights attorney and law professor); William Kristol (former Chief of Staff to the Vice President (1989-1993)); Eric P. Liu (not-for-profit CEO and former White House official); Marc H. Morial (former Mayor of New Orleans); Maureen O'Connor (former Ohio Supreme Court Chief Justice); Richard H. Pildes (Sudler Family Professor of Constitutional Law at NYU School of Law); Lewis F. Powell III (attorney and member of the Virginia Bar); Thomas Rogers (former Capitol Hill committee counsel); Mary Smith (former ABA President); and Larry D. Thompson (former Deputy Attorney General).

7 This report also includes the first-rate writing and research of: Christopher Adsit (Yale Law School '26); Charles Bachmann (Cardozo Law School '25); Matt Beattie-Callahan (Yale Law School '26); Connor Brashear (Yale Law School '25); Charlotte Cooper (Columbia Law School '25); Sara Graziano (Columbia Law School '26); Riler Holcombe (Yale Law School '26); Romina Lilollari (Yale Law School '25); Bryce Morales (Yale Law School '26); Megha Parwani (Yale Law School '26); Jacob Schwartz (Harvard Law School '25); Avery Wasson (University of Chicago Law School '26); and Hannah Weinstein (Harvard Law School '25).

factors *underlying* the current crises. The recommendations we advance below were developed over the course of two years and two U.S. presidents' administrations. Some of our recommendations are similar to those that have been advanced by the ABA over the years. They address the long-term systemic problems deeply rooted in our democracy; in other words, an alarming era in American political history, not any particular moment or crisis.

Overall, the Task Force believes our nation must re-dedicate itself to civics education to create a more informed and engaged electorate. The Task Force also believes that government at the state and national levels must take steps to bolster public confidence in the integrity of elections and reform the very manner in which our political leaders are elected. Put another way, politicians must become more closely accountable to the broad swath of people they purport to represent.

Finally, the Task Force believes that lawyers have been part of the problem and must be part of the solution. Lawyers have a special role to play in responding to the current crisis. There are over 1.3 million lawyers in the United States, spread across almost every county and town in the country. Virtually every lawyer in the United States has had three years of legal education. Every American lawyer must learn about the Constitution and our judicial system. Every American lawyer takes an oath to support and defend the Constitution. By that oath, every American lawyer is an "officer of the court" who undertakes a personal obligation to promote justice and uphold the law. Lawyers, therefore, have the unique skills to defend democracy, the Constitution, and the rule of law. Just as doctors were on the frontlines of the Nation's response to the COVID-19 pandemic, lawyers must now answer the clarion call to defend American democracy and the rule of law.

Since this Task Force was stood up two years ago, we have been encouraged to find many others across this country who share our concerns and have been spurred to action. The Task Force has found itself at the coordinating center of activities of many state and local bar associations and NGOs, all dedicated to preserving and improving our democracy. Those activities are set forth in detail in Section II below.

Here is a summary of our recommendations:

RE-INVIGORATE AMERICAN CIVICS EDUCATION

The Task Force believes our nation's lack of funding for and declining emphasis on civics instruction has contributed to a growing distrust in democratic institutions, especially among younger generations who believe our democracy does not deliver for them. Knowledge of basic civics among the American populace has declined in recent years. The federal government cannot and should not mandate any specific school curriculum or programming. However, it can and should invest in civics education in schools. The Task Force supports federal legislation to substantially increase federal funding for civics education in K-12 public schools. Bipartisan legislation offered in Congress in 2022, the Civics Secures Democracy Act,[8] exemplifies the Task Force's commitment to increased federal funding that maintains local autonomy. This legislation received endorsements from

8 S. 4384, 117th Cong. (2022).

over 200 civic organizations and would have reversed decades of underinvestment in civics education. At the same time, states should adopt enhanced civics instructional requirements for all grade levels and introduce students to civics curriculum at earlier ages. The Task Force also calls on colleges and universities to offer advanced civics education.

CITIZEN REDISTRICTING COMMISSIONS

Legislative redistricting is necessary and legitimate with a constantly shifting electorate, but the politicized nature of the process means that the dominant party often engages in gerrymandering to entrench and increase its hold on power. Put simply, this means the politicians get to pick their voters, not the other way around. The Task Force endorses the ABA's own prior recommendations for redistricting reform and supports efforts underway in various states to create independent citizen redistricting commissions. As of this writing, eighteen states—including Arizona, California, Colorado, and Michigan—have some form of redistricting commission, but they vary widely in structure and composition.

OPEN, NONPARTISAN PRIMARIES; RANKED-CHOICE VOTING; FUSION VOTING

Partisan gridlock represents a major threat to our democracy. It is driven by elected representatives who take extreme political positions to appease their extreme and narrow political bases. The Task Force is convinced that the partisan primary system that currently exists across much of the country is a source of much extremism and congestion. The Task Force believes states should consider whether one, two, or all three of the following voting reforms would promote democracy in their particular circumstances: (1) open, non-partisan primaries; (2) rank-choice voting; and (3) fusion voting. These measures reward the candidates with the broadest electoral appeal. Depending on the jurisdiction, these changes can be adopted through legislation or a ballot measure.

REDUCING PARTISAN INFLUENCE IN ELECTION ADMINISTRATION

Across the country, election officials are selected through political processes, and the position of state or local election official is becoming even more politicized. The Task Force endorses state-level reform measures to depoliticize officials, offices, and commissions with responsibility for election administration. One model for state-level non-partisan election administration in the United States is Wisconsin's Government Accountability Board,[9] which consisted of retired judges who were not members of any political party or otherwise connected to partisan politics. The Task Force also recommends that professional certifications and ethical standards for election officials and workers be developed and promoted alongside a strong, enforceable code of professional responsibility for election officials.

INCREASE ELECTION WORKER SAFETY

The Task Force endorses federal funding by the Department of Homeland Security to improve election security; state-level enhancements of the criminal penalties for

9 *See* J. Mijin Cha & Liz Kennedy, Demos, Millions to the Polls – Practical Policies to Fulfill the Freedom to Vote for All Americans 43 (2014).

interfering with election workers' official duties (*see*, *e.g.*, Maine); state-level legislation that expands the legal protections for election workers beyond polling locations (*see*, *e.g.*, Colorado and Virginia); and guidance to local law enforcement to improve investigations of criminal conduct directed at election workers.

INCREASE ACCESS TO VOTING

The United States lags behind other democratic nations in overall voter participation. Over the years, there have been countless proposals for enhancing access to voting in U.S. elections. The Task Force endorses efforts to expand the pool of registered voters by adopting automatic voter registration; removing barriers to same-day voter registration; ensuring that voter registration lists are regularly maintained; and ensuring that individuals can easily check their voter registration status. The Task Force endorses federal legislation offered in 2024, the "Election Day Holiday Act."[10] Further, we encourage states to allow voters to use more than one form of identification document to vote, to standardize deadlines and procedures for early and mail-in voting, and to improve processes for curing ballot errors.

IMPROVE THE CYBERSECURITY OF OUR DEMOCRATIC PROCESS

The cybersecurity of election infrastructure is essential to the integrity of election results.[11] Since the 2016 elections, Congress and other government entities have been proactive in guaranteeing defensible and resilient election cybersecurity. But the threat landscape continues to evolve. As threats develop, the United States must adjust to safeguard the democratic process. The Task Force encourages efforts to continue to enhance the cyber resilience of state and federal election infrastructure. This includes transitioning nationwide to hand-marked paper ballot voting machines and affirming election results with post-election risk-limiting auditing. The Task Force also supports voting machines that produce paper trails to insulate votes from electronic tampering and facilitate post-election audits.

REFINE THE ROLE OF THE PRESS AND SOCIAL MEDIA IN PROMOTING OUR DEMOCRACY

A free press plays an essential role in reinforcing election credibility and transparency. But today, the rise of alternative news sources and other forms of generative artificial intelligence has greatly complicated media coverage of our democracy in action, as disinformation and "deepfakes" made their mark on the 2024 elections. The Task Force encourages news outlets to continue to develop and employ responsible election-night reporting practices. Most urgently, we support efforts at the federal level to adopt laws like those in Wisconsin and Arizona that require disclosure of campaign material that includes AI-generated content. Bipartisan legislation pending in Congress as S. 1213, the "Protect Elections from Deceptive AI Act," would prohibit the intentional distribution of "materially deceptive" AI-generated

10 H.R. 7329, 118th Cong. (2023-2024)

11 *See* Alan Butler, *Election Cybersecurity Amid a Global Pandemic*, A.B.A.: Hum. Rts. Mag. (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/election-cybersecurity-amid-a-global-pandemic.

audio or visual political content related to candidates running for office. The Task Force also encourages private industry to adopt policies that guard against the spread of deceptive AI associated with elections. Meanwhile, the Task Force concurs with the view that government regulators should *not* be empowered to designate content "fake news"—a constitutionally suspect authority with an enormous potential for misuse in a free society.

ENHANCE THE OBLIGATIONS OF LAWYERS IN OUR DEMOCRACY

The Task Force recommends that the ABA and state and local bar associations continue efforts to address threats to democracy, the rule of law, and the independence and legitimacy of the courts. The Task Force recommends, among other things, that the various state-level oaths of admission for attorneys be amended to include a commitment to upholding democracy and the rule of law, and that the ABA, state and local bar associations, state supreme courts and other state-level regulatory bodies provide further guidance concerning the special obligations of lawyers to respect and promote the rule of law, our democracy, the courts and court orders.

CURB FRIVOLOUS ELECTION-RELATED LAWSUITS

Frivolous election-related lawsuits are by their very nature high-profile, filed and litigated on an expedited basis, and often threaten to sidetrack an election. The Task Force recommends legislation at the federal and state levels to require election challenges to go before three-judge panels accompanied by an expedited appellate pathway, similar to the three-judge panels that currently hear challenges under the Voting Rights Act. The Task Force also recommends that states explore changes in law that allow for special motions to dismiss, cost shifting, and potential sanctions if a party is found to have filed a frivolous election-related lawsuit, like anti-SLAPP laws that deter frivolous defamation suits currently on the books in most states.

ENHANCE LAW SCHOOL TRAINING ON DEMOCRACY AND THE RULE OF LAW

The Task Force endorses the June 18, 2024, letter signed by over 100 law school deans, committing to a greater focus on the rule of law in law school courses and other offerings. We agree with the goal to train the next generation of lawyers to sustain our constitutional democracy and the rule of law.

DISAGREE BETTER

Finally, Task Force member and former federal appellate Judge Thomas Griffith is a strong advocate for "Disagree Better," an initiative launched by Utah Governor Spencer Cox in July 2023. The essence of Disagree Better is to encourage "disagreement with civility and kindness." The Task Force applauds Disagree Better and recommends similar initiatives within legislatures, town councils, bar associations, colleges and universities, high schools, churches, community groups, and beyond.

In all, the Task Force embraces as its own the Society for the Rule of Law's recently promulgated *Statement of Principles to Preserve, Protect, and Defend the Constitution, the Rule of Law, and American Democracy*. The

Task Force led efforts to have these principles adopted by the ABA House Delegates in August 2024 as official ABA policy. Specifically, those Principles include respecting the constitutional rights of all Americans, the results of elections, and the peaceful transfer of power, as well as honoring "America by preserving, protecting, and defending the Constitution of the United States, the rule of law, and America's democracy."[12]

12 Soc'y for the Rule of L., *Statement of Principles to Preserve, Protect, and Defend the Constitution, the Rule of Law, and American Democracy*, https://societyfortheruleoflaw.org/statement-of-principles/ (last visited Aug. 27, 2025).

II. The Task Force's Work

Upon becoming ABA President on August 8, 2023, Mary Smith announced the creation of an ABA Task Force for American Democracy, to be co-chaired by former federal appellate Judge J. Michael Luttig and former Secretary of Homeland Security Jeh Charles Johnson. The Task Force led by Judge Luttig and Secretary Johnson is a bipartisan group of distinguished Americans consisting primarily, but not exclusively, of lawyers. The Task Force included practicing attorneys, retired federal and state judges, law professors, law school deans, election law experts, a former candidate for president, retired corporate CEOs, a retired three-star Navy admiral, commentators, scholars, historians, and leaders of public interest organizations. The members of this diverse and distinguished group all joined because of their common devotion to preserving the rule of law and our American democracy. Many Task Force members have been thought leaders in developing and advancing reforms to strengthen our democracy.

The Task Force was asked to "consider and propose solutions for educating our citizens on the importance of an inclusive, strong, and enduring democracy and help to provide bulwarks to bolster our democracy as conceived." These recommended solutions are summarized in Section I above and set forth in detail in Section III below.

Beyond that, the Task Force took on an action-oriented, operational role to meet the urgency of the 2024 election. This involved taking immediate steps to educate, motivate, and support the work of lawyers, public officials, and election officials around the country in the run-up to the 2024 election. As a result, the Task Force found itself at the coordinating center of the activities of many state and local bar associations and NGOs, all dedicated to preserving and improving our democracy. Given that defending the Constitution and the rule of law are common threads running through the work of all these organizations, the Task Force was ideally positioned to serve as a proverbial "hub" for their efforts. These activities are described below.

LISTENING TOURS

At the outset, Task Force leaders recognized the need for community-focused listening tours in key battleground states around the country. Throughout 2024 and 2025, the Task Force held the following Listening Tour events:

- Georgia Listening Tour held at the Bar Center of the State Bar of Georgia (February 13, 2024).
- Michigan Listening Tour held at the Wayne State University Law School (March 15, 2024).
- Pennsylvania Listening Tour held at the National Constitution Center in Philadelphia, Pennsylvania (May 1, 2024).

- Wisconsin Listening Tour held at the Wisconsin State Bar Center (July 9, 2024).
- Connecticut Listening Tour held at the Legislative Office Building (September 4, 2024).
- Ohio Listening Tour held at the University of Cincinnati College of Law (September 18, 2024).
- Arizona Listening Tour held at the Sandra Day O'Connor College of Law at Arizona State University (January 29, 2025).

The goals of these Listening Tours were to:

- Form state-level networks by educating attendees about our elections and the importance of American democracy and the rule of law.
- Gain an understanding of the concerns of Listening Tour attendees about our elections and democracy, and to solicit their ideas for solving the issues we face.
- Assist attendees in forming "Next Steps Committees" of volunteer lawyers and other individuals willing to give talks and take action on supporting our elections, including by dispelling misinformation and disinformation and further educating members of their communities on democracy and the rule of law.

When the Task Force reached out to a state about holding a Listening Tour, the process typically began by recruiting leading lawyers, bar associations, and law schools in that state to form a nucleus of organizers. Those individuals and entities then helped the Task Force recruit local election officials, business, community, and faith leaders, educators, democracy-oriented NGOs, students, and others to help set the agenda for the event, extend invitations, and arrange the logistics with help from Task Force staff. The events' agendas generally followed the goals set forth above, but were unique to each state, given unique local issues. Where feasible, the Task Force arranged for the event to be recorded and livestreamed and for the press to be invited. The goal at the end of each Listening Tour stop was to help the state form a "Next Steps for Democracy Committee" with a network of subcommittees to actively promote our democracy and elections.

The Listening Tours were all well attended and well received. Each of the Listening Tour events included state election officials, and in Georgia, Michigan, and Pennsylvania, the state's Secretary of State was able to join. Video recordings of the Listening Tours can be accessed here. The Task Force also created a Listening Tour Toolkit that bar associations and groups of lawyers around the country can use to put on similar events in their communities in the future.

NEXT STEPS COMMITTEES

As noted, a desired outcome of the Listening Tours was the establishment of a Next Steps Committee in each of the states visited. We established Next Steps Committees in Georgia, Michigan, Pennsylvania, Wisconsin, and Connecticut. Next Steps activities included setting up speakers' bureaus of volunteer lawyers willing to give talks on democracy and the Rule of Law, elections and election law, the Constitution, as well as other related topics. In addition, Rapid Response teams of lawyers and other community leaders are formed to respond to misinformation and disinformation about our elections as they arise in their communities. Finally, Next

Steps Committees recruited lawyers to serve as poll workers around their state. To support the work of these Next Steps Committees, Task Force staff and volunteers created a host of speakers guides on a range of topics and collaborated with the Committees on the ways that lawyers could best dispel election misinformation as it arises in their communities.

STRATEGIC COMMUNICATIONS

Two Task Force members and the Task Force's communications advisor, Steve Silverman, led the Task Force's strategic communications effort. In addition to members of the legal profession, we gave attention to national messaging that members of the Task Force delivered to the public to improve trust in our elections and highlight the role that democracy and the rule of law play in everyday American lives.

Meanwhile, members of the Task Force, including Judge Luttig and Secretary Johnson, spoke at various public events to promote the work of the Task Force. For example:

- On August 9 and 10, 2023, Judge Luttig and Secretary Johnson appeared on CNN and MSNBC to announce the formation of the Task Force.
- On November 2, 2023, Judge Luttig and Secretary Johnson both accepted the Public Service Award from the Aspen Institute at its annual dinner in New York City.
- On December 6, 2023, Judge Luttig and Secretary Johnson participated virtually in a session of the ABA President's speaker series to discuss the work of the Task Force.
- On February 9, 2024, Judge Luttig and Secretary Johnson spoke about the work of the Task Force at the annual meeting of the National Constitution Society hosted by Task Force member Jefrey Rosen in Miami, Florida.
- On April 3, 2024, former appellate Judge and Task Force member Thomas Griffith and Secretary Johnson spoke at Yale Law School about the work of the Task Force. As he has in a number of other places, Judge Griffith highlighted the work of the initiative "Disagree Better."
- On April 16, 2024, Secretary Johnson spoke to a New York City Bar Association webinar about the role of lawyers in preserving our democracy.
- On April 26, 2024, Secretary Johnson delivered an address at the University of Chicago about "the Dangers to Democracy at Home and Abroad," during which he referenced the work of the Task Force.
- On April 30, 2024, then-ABA President Smith spoke at the Center for Strategic and International Studies (CSIS) Civics Summit: The Role of Business in Sustaining Democracy in Washington, D.C., on a panel entitled "Plenary Panel–Beyond Advocacy: The Evolving Role of Lawyers in Strengthening Civic Engagement" during which she discussed the work of the Task Force. Task Force member Richard Haass also spoke at this event.
- On May 3, 2024, then-President Smith, Judge Luttig, and Secretary Johnson spoke

at the annual meeting of the ABA Litigation Section about the work of the Task Force.

- On May 22, 2024, Judge Luttig and Secretary Johnson spoke about the work of the Task Force at a meeting of the Gephardt Institute for Civic and Community Engagement in Washington, D.C. (former Congressman Dick Gephardt is a Task Force member).
- On June 5, 2024, then-President Smith spoke at the U.S. News & World Report 2nd Annual State of Equity in America Summit in Washington, D.C., on a panel entitled "Election 2024: You Are Right to Vote and Your Right to Vote" in which she highlighted the work of the Task Force.
- On July 25, 2024, the Task Force and Troutman Pepper kicked off a three-part webinar series: A Lawyer's Role in Protecting the Rule of Law, Civil Discourse, and Election Integrity: A 3-Part CLE Series. The first webinar, entitled "Session 1: American Democracy and the Rule of Law," included President Smith, Judge Luttig, and Advisory Committee Vice Chair Lauren Rikleen.
- On August 2, 2024, then-President Smith, Judge Luttig, Secretary Johnson, and Vice Chair Bill Ide spoke on the Task Force's work at the ABA summit on democracy held during its annual meeting in Chicago. The summit brought together legal professionals around the country to learn how to protect democracy and ensure trust in our election systems.
- On August 6, 2024, the Task Force and Troutman Pepper hosted the second in its three-part webinar series. This webinar, entitled "Disagreeing Better," included Task Force member Judge Thomas Griffith.
- On September 11, 2024, the Task Force and Troutman Pepper hosted the third in its three-part series of webinars entitled "Election 2024: Threats, Myths, and What We Can Do to Protect the Vote."
- On September 16, 2024, Past President Smith,[13] Judge Luttig, and Advisory Committee member Jack Young spoke at a Constitution Day event at the University of Virginia in Charlottesville.
- On October 7, 2024, Judge Luttig spoke about the work of the Task Force at the Rotary Club of Atlanta's American Democracy & the Presidential Election of 2024 event.
- On February 21, 2025, Past President Smith spoke at the New Hampshire Bar Association Midyear Meeting on a panel, "The Lawyer's Role in Protecting the Rule of Law, Civil Discourse, and the Courts," where she described the continuing work of the Task Force.
- On March 1, 2025, Past President Smith spoke on the work of the Task Force at the Virginia State Bar Association council meeting.
- On April 18, 2025, Past President Smith and Advisory Committee Member Judge Peter Reyes spoke on an American Bar Association Business Law Section Rule of Law Working Group webinar, "Understanding the Rule of Law: A Law Student's Guide."
- On April 24, 2025, Past President Smith spoke on the Task Force's work at the

13 President Smith's term as ABA President concluded on August 6, 2024.

meeting of the Rule of Law Working Group at the ABA Business Law Section Spring Meeting.

- On March 25 and May 25, 2025, Task Force member and NYU Professor of Law Rick Pildes participated in several Task Force webinars: the first focusing on defending the judiciary, and the second and third on providing guidance to lawyers on how they can get involved to promote the rule of law.

LAW SCHOOL DEAN'S LETTER

Spearheaded by former Yale Law School Dean Heather Gerken and former Judge Thomas Griffith, over 120 law school deans signed a letter affirming their commitment to train the next generation of lawyers on their duty to support our constitutional democracy. The June 18, 2024, letter also affirmed the deans' commitment to train lawyers to further the public's understanding of the rule of law, our justice system, and how to disagree respectfully and engage across political and ideological divides. The letter can be accessed here.

ELECTION LAW SEMINARS HELD IN CONJUNCTION WITH THE KNIGHT FOUNDATION

The Task Force partnered with the Knight Foundation in the months leading up to the November 2024 election to host the Knight Election Law Forums, a virtual series aimed at equipping journalists with essential, nonpartisan, fact-based knowledge on election law to better inform their communities in the lead-up to the 2024 elections and beyond.

The initial forum featured a panel of national election law experts, David Becker, Ben Ginsberg, and Bob Bauer, and included remarks from Yale Law Dean Heather Gerken and Task Force Co-Chair Judge Luttig. This opening session, moderated by former CNN anchor Poppy Harlow and NBC reporter Tracie Potts, attracted over 600 registrants. Following this initial forum, the Task Force co-sponsored with Knight a series of state election law webinars in the seven "swing states," attended by several hundred journalists, which were hosted at local law schools:

- **National Webinar:** The September 5th event was the first in a series of Knight Election Law Forums, a collaboration between Knight Foundation and the Task Force. This virtual series aims to equip journalists with essential, nonpartisan, fact-based knowledge on election law to better inform their communities in the lead-up to the 2024 elections and beyond. Speakers included David Becker, Heather Gerken, and Ben Ginsberg (September 5, 2024).
- **Nevada webinar:** The second webinar in the series focused on Nevada's specific election laws tailored for local journalists (September 11, 2025).
- **Georgia webinar:** The third webinar in the series focused on Georgia's specific election laws tailored for local journalists (September 18, 2025).
- **Arizona webinar:** The fourth webinar in the series focused on Arizona's specific election laws tailored for local journalists (September 23, 2025).
- **Michigan webinar:** The fifth webinar in the series focused on Michigan's specific

election laws tailored for local journalists (September 25, 2025).

- **Pennsylvania webinar**: The sixth webinar in the series focused on Pennsylvania's specific election laws tailored for local journalists (October 4, 2025).
- **Wisconsin webinar**: The seventh webinar in the series focused on Wisconsin's specific election laws tailored for local journalists (October 8, 2025).
- **North Carolina webinar**: The eighth webinar in the series focused on North Carolina's specific election laws tailored for local journalists (October 14, 2025).
- **Myth-Busting from Top Experts**: The ninth and final webinar in the series, focusing on debunking common election law myths, featuring leading experts, including David Becker and Ben Ginsberg.

COLLABORATIONS WITH DEMOCRACY NGOS

Task Force members interacted and coordinated with a host of NGOs also dedicated to supporting American democracy and rule of law efforts. Through these interactions, NGOs learned of the Task Force's work and discussed where we and they might be able to collaborate. These NGOs range from groups organized around a particular vocation seeking to defend democracy (e.g., business leaders, retired military, prosecuting attorneys) to groups with a particular focus (e.g., improving civility, improving civics knowledge, reducing misinformation).

Given that law and legal issues are a common thread that runs through the work of these diverse groups, the Task Force had the opportunity to serve as the proverbial "hub" of the wagon wheel for this work, with the spokes focused either on a given topic or on engaging a particular community. In all, the Task Force served as a convening platform for a wide array of democracy and rule of law-related activities.

WORK OF THE ABA ADVISORY COMMISSION

The ABA Advisory Commission is a bipartisan, diverse group of thirty geographically dispersed lawyers from past and present ABA leadership and from other national, state, and local bar associations. Led by Chair Carl Smallwood and Vice Chair Lauren Rikleen, the Advisory Commission took on the mission to broaden the reach of the Task Force's work. This included identifying bar associations throughout the country that were willing to implement a "Summit for Democracy and the Rule of Law." The Advisory Commission aimed to reach lawyers in as many states as possible, as soon as possible. The first outreach took place in early February 2024 in a presentation to the National Conference of Bar Presidents, which included the leaders from state, local, and special focus bars from 53 states and territories, as well as past bar leaders from

these jurisdictions. The goal of the Advisory Commission was to inspire and mobilize the legal profession to use its convening powers and other skills to engage broader audiences to actively support and defend American democracy, the Constitution, and the rule of law. In particular, the goals of each Advisory Commission summit were to:

- Provide presentations to serve as a foundational briefing on why American democracy, the Constitution, and the rule of law are at risk.
- Set forth the compelling reasons why lawyers have the unique skills needed and should engage in a non-partisan way with their communities in the protection of all three.
- Develop tools to help lawyers shift the partisan language around these issues and reframe the conversation, so they understand that protecting American democracy, the Constitution, and the rule of law are neither political nor partisan.
- Help mandatory bar associations understand that the Supreme Court's decision in Keller v. State Bar of California, 496 U.S. 1 (1990) (holding that attorneys who are required to be members of a state bar association have a First Amendment right to refrain from subsidizing the association's political or ideological activities) should not necessarily be a bar to promoting the protection and preservation of democracy, the Constitution, and the rule of law.
- Provide talking points to assist bar associations and lawyers in sponsoring events and programming with other stakeholders.

DEMOCRACY SUMMIT AND THE "UNSUNG HEROES OF DEMOCRACY AWARDS"

As part of the ABA's annual meeting in Chicago, then-ABA President Mary Smith convened a Democracy Summit on August 2, 2024, featuring the Task Force and its work. It featured Task Force members in conversations and provided an overview of the Task Force's work to date.

Yale Law School Dean Heather Gerken suggested that the Task Force consider giving out awards to acknowledge and recognize the in-the-trenches, behind the scenes work of lawyers, election workers, everyday citizens, and non-profit organizations that stand up for American Democracy and the rule of law. The ABA Board of Governors approved these awards to recognize the efforts of individuals and organizations that (often in anonymity) do the right thing, despite their own peril, and to hold them out as role models to demonstrate that virtually anyone can play a role in protecting our democracy. These 22 awards were given out at the aforementioned Democracy Summit on August 2nd. The list of those organizations and individuals who received the awards is available here.

TASK FORCE HOSTED CLES

Recognizing that many lawyers are not knowledgeable on election law, the Task Force and Troutman Pepper organized a series of three virtual CLE sessions available free of charge to lawyers around the country. In

addition to covering election law, the sessions addressed the role lawyers can play to defend the constitution and the rule of law in their communities, included a session on how to "Disagree Better," and addressed the role lawyers can play in returning civility and civil discussion to the public square. The speakers and agendas for these CLE sessions are available here. The Task Force also referred to additional CLE and informational programming by ABA sections, committees, and other entities developed in coordination with the Advisory Committee.[14]

WHITE PAPERS

As part of the Task Force's efforts, a number of well-known and respected authorities generated working papers and background papers that informed the Task Force's recommendations in Section III of this report:

1. *Political Reforms to Combat Extremism*, by Richard H. Pildes.
2. *Increasing Trust in Our Elections, by Edward B. Foley The State of Civics Education in the General Populace*, by Robert A. Kelly.
3. *Deepfakes and American Elections*, by N. David Bleisch.
4. *Addressing Baseless Election Related Lawsuits*, N. David Bleisch.
5. *Improving Participation in Democratic Processes*, by Robert A. Kelly.
6. *Why Democracy?* by Nisha Lee and Katherine Moss.
7. *How Does the First Amendment Right of Free Speech Intersect with Democracy? by Jennifer Cook Purcell.Democracy: the Rule of Law and Human Rights*, Nisha Lee and Katherine Moss.
8. *Reinvigorating American Democracy – A Youth Perspective*, by Katherine Moss and Nisha Lee.
9. *Improving Access to Voting*, by Jack Young & Jason Kaune.
10. *The State of Democracy Education in Law Schools*, Jacob Williams and Sydney Grell.
11. *Keeping the Administration of Our Elections from Becoming Politicized*, by Edward B. Foley.
12. *Decreasing the Political Polarization of the American Public*, by Edward B. Foley.
13. *Addressing Negative Partisanship with Mobile Voting*, by Jocelyn Bucaro.
14. *Reviving the American Tradition of Fusion Voting*, by Lee Drutman, Tabatha Abu El-Haj, and Beau Tremitiere.

14 E.g., in collaboration with the Advisory Committee, ABA Standing Committee on Election Law, and ABA Commission on Law and Aging, the Task Force produced a series of webinars tailored to help lawyers inform voters about the nuts and bolts of election law based on the ABA Election Administration Guidelines and Commentary, available at Empowering Every Voter: Voter Education Webinar Series. Other programming can be found through the ABA CLE program on the Rule of Law in America.

15. *Proportional Representation*, by Ruth Greenwood, Drew Penrose, and Deborah Apau.

16. *What We Know About Ranked Choice Voting, Updated for 2025*, Eveline Dowling and Caroline Tolbert.

Each of these white papers and background papers is available on the Task Force's website here.

THE TASK FORCE DEMOCRACY DATABASE

Co-chair Judge Luttig and various Task Force members and advisors routinely sent the Task Force and staff links to articles, op-eds, and third-party studies concerning the issues the Task Force sought to address. This material served to inform the Task Force's work.

Reading each of these items, preparing a summary of how they relate to the Task Force's work, and putting it into a searchable database was a valuable but time-consuming process. Fortunately, upon hearing of the Task Force's desire to create such a database, Heather Gerken, Dean of Yale Law School, agreed to enlist six Yale Law students to undertake this work under the guidance of several Task Force volunteers. The Task Force expresses its gratitude for this work to Yale Law students Christopher Adsit, Matt Beattie-Callahan, Connor Brashear, Bryce Morales, Megha Parwani, and Romina Lilollari. Their work resulted in a searchable Democracy Database of summaries available on the Task Force's website here.

POST-2024 ELECTION STRATEGIC PIVOT

Following the November 2024 U.S. presidential election, the Task Force underwent a significant strategic realignment. The Task Force shifted its focus from pre-election concerns about electoral integrity and institutional checks and balances to a post-election emphasis on preventing democratic backsliding in the United States. This pivot reflects the evolving challenges facing American democratic institutions and the legal profession's unique role in safeguarding constitutional principles.

The Task Force's mandate from the ABA expired August 12, 2025, but our work will continue. Now an independent entity, the Task Force's new mandate will center on interconnected pillars designed to strengthen democratic resilience through legal profession leadership and community engagement. This approach recognizes that protecting democracy requires both institutional safeguards and grassroots civic participation, with attorneys serving as crucial intermediaries between legal institutions and the broader public.

III. Our Recommendations

As originally constituted by the ABA, the Task Force was to "consider and propose solutions for educating our citizens on the importance of an inclusive, strong and enduring democracy and help to provide bulwarks to bolster our democracy as conceived," to uphold the rule of law, and to deliver those recommendations in writing to the ABA at its annual meeting in Chicago in 2024. In particular, the Task Force was assigned to consider:

- Educating our citizenry on the importance of an inclusive, strong, and enduring democracy.
- Maximizing voter confidence and participation in our democratic process.
- Disincentivizing irresponsible and extremist rhetoric and positions among elected officials and candidates for elected office.
- Ensuring nonpartisan election administration.
- Ensuring the safety and integrity of state and local election officials and workers across the country.
- Encouraging the press and social media to contribute to the promotion of our democracy and avoid denigrating it.
- Educating on how the role of cyberspace and AI can play in either promoting or corrupting the American democratic process.
- Exposing anti-democratic vulnerabilities in the way candidates for federal office are elected in this country.
- Promoting potential changes in federal, state, and local laws to meet these ends.

Additionally, it is our view that lawyers in particular should have a responsibility to preserve and defend our democracy and that upholding the rule of law is essential to that aim. Thus, Past President Smith and the Task Force included within our mission the consideration of ways to:

- Inspire and mobilize America's legal profession to actively support and defend American democracy.
- Encourage the ABA, state, and local bar associations to continue efforts to address threats to democracy, the rule of law, and the independence and legitimacy of the courts, and ensure that lawyers are educated about the importance of upholding these principles.
- Leverage the legal profession to educate the public on the reasons for and the importance of democracy and the rule of law.

In the pages that follow are our recommendations for reform. As stated above, the recommendations we advance below were developed over the course of two years and two U.S. presidents' administrations;

they are intended to address the long-term systemic problems we see deeply rooted in our democracy. We intend to speak of an era in American history, not to any particular moment or crisis.

None of these proposals is original. They are well-developed reforms, many of which have already been adopted at the state level or are embodied in pending federal or state legislation. The ABA itself has for years advanced some of these same proposals. Some members of our own Task Force are themselves thought leaders in advancing many of these reforms.

A. Reinvigorating American Civics Education

High-quality civics education is a prerequisite for a functioning democracy. Studies indicate that when citizens are informed about the structure of their government and the role they play in its maintenance, they are better able to make sense of contemporary public issues and are more willing to participate in civic life as a means of addressing those issues.[15] Likewise, students who receive robust civics instruction are more likely to complete college, vote in elections, engage in policy discussions with their friends and family, volunteer in their communities, and develop valuable skills in public speaking, critical thinking, and problem solving.[16] An investment in civics education today would yield long-term results as the next generations inherit the responsibility to safeguard our democracy and the rule of law.

PROBLEM STATEMENT

Since the nation's inception, leaders have recognized the importance of an educated citizenry for democracy. Thomas Jefferson and James Madison touted the virtues of civics education.[17] They wrote that civics education was essential for protecting the power and rights of citizens because it encouraged a level of civic engagement that would hold the government accountable to those under its rule.[18] Jefferson and Madison's perspective was popular, yet there was little to no formal schooling on civics during much of the country's early history. Until the early nineteenth century, most Americans learned civics at home, at work, or at church, rather than in school.[19]

This dynamic changed with the advent of state-funded public education in the 1830s.

15 Rebecca Winthrop, Brookings Inst., The Need for Civic Education in 21st-Century Schools 5 (2020), https://www.brookings.edu/articles/the-need-for-civic-education-in-21st-century-schools.

16 *14 Reasons Why Teaching Civics Is Important Right Now*, iCivics (Feb. 14, 2022), https://vision.icivics.org/14-reasons-why-teaching-civics-is-important-right-now/.

17 *History of Civics Education in the United States*, Acad. 4 Soc. Civics, https://new.academy4sc.org/research/history-of-civics-education-in-the-united-states/ (last visited June 6, 2025).

18 *Id.* (citing Jack Crittenden & Peter Levine, *Civic Education*, Stan. Encyc. Phil. (Edward N. Zalta ed., 2018), https://plato.stanford.edu/archives/fall2018/entries/civic-education/).

19 Glenn C. Altschuler & David Wippman, *We Have a Civics Education Crisis – and Deep Divisions on How to Solve It*, Wash. Post (May 31, 2023), https://www.washingtonpost.com/made-by-history/2023/05/31/civics-education-history.

Early reformers like Horace Mann endeavored to create schools that would produce model citizens by emphasizing civics and morality, "teaching the basic mechanisms of government, and imbuing students with loyalty to America and her ideals."[20] Wary of the potential for the politicization of civics curriculum, Mann advanced a form of civics education that was apolitical. Civics was to be taught through the "study, memorization, and recitation of patriotic speeches and foundational texts."[21] Civics education would not just reflect the personal political beliefs of individual instructors.

Mann's vision of a neutral American civics education proved difficult to achieve in practice. Major political conflicts throughout the 20th century, including two World Wars and the Cold War, stirred strong nationalist and isolationist sentiments. Efforts to teach material deemed disloyal to America were met with backlash from elected officials who felt that schools had a responsibility to "promote an abiding love of American institutions" and protect "against the evils of communism."[22] This goal was reflected in Congress's 1947 Zeal for Democracy Program, which encouraged schools to define American democracy as opposed to totalitarianism but did so without any critical examination of American democracy itself or its role in society.[23]

Further, reformers in the 1960s called for a reexamination of the dominant America-first account that glossed over the country's painful relationship with slavery, anti-immigrant policies, and McCarthy-era censorship.[24] Many urged schools to transform the mainstream version of American history and government being taught in classrooms into a pluralist, multicultural civics curriculum that incorporated the narratives of those from marginalized and underrepresented backgrounds.[25] Such changes to American civics curricula were met with significant pushback. In 1992, for example, the Senate almost unanimously rejected an attempt to establish more inclusive national history standards and adopt curriculum guidelines developed by a coalition of civic organizations and educators.[26]

As the national debate regarding the contents of civics curriculum raged on, the country was also facing concerns about national security and America's competitiveness in the global economy. The Soviet Union's launch of the Sputnik space satellite in 1957 ignited fears among Americans that the country was falling behind compared to the rest of the world in the domains of science and technology.[27]

20 *History of Civics Education in the United States*, *supra* note 17 (quoting Crittenden & Levine, *supra* note 18).

21 Altschuler & Wippman, *supra* note 19.

22 *Id.*

23 *Id.* (citing Maureen Kudlik et al., *McCarthyism in Education*, All. for Networking Visual Culture (Mar. 14, 2016), https://scalar.usc.edu/works/constructing-a-culture/mccarthyism-in-education).

24 *Id.*

25 *Id.*

26 *Id.*

27 Educating for Am. Democracy, iCivics, Educating for American Democracy: Excellence in History and Civics for All Learners 5 (2021), https://www.educatingforamericandemocracy.org/wp-content/uploads/2021/02/Educating-for-American-Democracy-Report-Excellence-in-History-and-Civics-for-All-Learners.pdf; Larry Abramson, *Sputnik*

These fears prompted American politicians to undertake a number of reform efforts to enhance science, technology, engineering, and math (STEM) education across the nation. In 2002, President George W. Bush signed the No Child Left Behind Act[28] into law, significantly increasing the role of the federal government in public education and mandating stricter standardized testing and reporting requirements for schools, especially in reading and STEM subjects.[29] The country's focus on reinvigorating STEM education persisted into the Obama Administration. In 2009, President Obama announced that the $4.35 billion Race to the Top school grant program would prioritize funds for states committed to improving STEM education.[30] And, that same year, the administration launched the Educate to Innovate campaign, designed to improve student performance in STEM subjects by creating public-private partnerships "dedicated to motivating and inspiring young people across America to excel in science and math."[31]

Meanwhile, strategic investments in basic civics and history education have taken a backseat. For FY 2022, Congress granted the Department of Education just $7.75 million to support civics education through competitive grants,[32] compared to $546 million for competitive grants to support STEM education in 2020.[33] Recognizing the lack of resources available for civics instruction, Congress increased funding for K-12 civics and history education to $23 million in FY 2023 through the end-of-year omnibus appropriations bill.[34] Despite requesting an additional increase to $73 million,[35] the Department of Education's civics and history appropriation remained steady for FY 2024.[36]

In addition to calling for the outright elimination of the Department of Education, the current administration has proposed eliminating the civics education grant program entirely and consolidating it and

Left Legacy for U.S. Science Education, NPR (Sept. 30, 2007), https://www.npr.org/2007/09/30/14829195/sputnik-left-legacy-for-u-s-science-education.

28 Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

29 *Id.*; *see also* Winthrop, *supra* note 15, at 3.

30 Press Release, White House, Off. of the Press Sec'y, President Obama Launches "Educate to Innovate" Campaign for Excellence in Science, Technology, Engineering & Math (Stem) Education (Nov. 23, 2009), https://obamawhitehouse.archives.gov/the-press-office/president-obama-launches-educate-innovate-campaign-excellence-science-technology-en.

31 *Id.*

32 Comm. for Econ. Dev., Policy Backgrounder: The State of Civics Education in the US 1 (2023), https://www.ced.org/pdf/CED_Policy_Backgrounder_Civics_Education_FINAL.pdf.

33 Sydney Ward, *Lack of Quality Civic Education in Public Schools in the United States*, Ballard Brief (May 2022), https://ballardbrief.byu.edu/issue-briefs/lack-of-quality-civic-education-in-public-schools-in-the-united-states.

34 Comm. For Econ. Dev., *supra* note 32, at 1.

35 U.S. Dep't of Educ., Fiscal Year 2024 Budget Summary 24 (2024), https://www.ed.gov/sites/ed/files/about/overview/budget/budget24/summary/24summary.pdf.

36 Nat'l Educ. Ass'n, *FY24 Appropriations Summary: Department of Education (ED)* (2024), https://www.nea.org/sites/default/files/2024-03/fy24-appropriations-summary.pdf.

several other funding streams into a block grant that states and locales would be able to spend at their complete discretion.[37] If Congress passes this proposed legislation, states should work to strike a fairer balance between funding for civics and history education—which is necessary for cultivating an engaged democratic populace—and funding for other vital subjects.

The disparity between federal investment in civics versus STEM education—about $0.05 per pupil compared to $0.50 per pupil—has had a troubling impact on civics learning, especially in school districts in states and locales with less money available to spend on civics.[38] The Council of Chief State School Officers estimates that 44% of school districts have reduced the amount of time spent on social studies since the early 2000s in order to prioritize math and science subjects that receive more federal funding.[39]

Given all this, it should come as no surprise that knowledge of basic civics and engagement among the American populace has declined to concerning levels in recent years. The Annenberg Public Policy Center's 2024 Constitution Day Civics Survey revealed that less than two-thirds of Americans could name all three branches of government, while a full 15% could not name a single branch.[40] A study from the U.S. Department of Education suggests that only 13% of eighth graders are proficient in U.S. history, while only 22% are proficient in civics.[41] Our nation's lack of funding for and emphasis on civics instruction has no doubt contributed to a growing distrust in democratic institutions, especially among younger Americans who believe that democracy cannot deliver results for them. Today, only 19% percent of young Americans trust the federal government to do the right thing most or all of the time, only 15% believe the country is heading in the right direction, and fewer than one-third approve of the President or either party in Congress.[42]

PROPOSED SOLUTIONS

Democrats, Republicans, and independents have consistently recognized civics education as the best means through which to empower the next generation to participate in their communities as engaged citizens, to combat cynicism and polarization, and to encourage

37 U.S. Dep't of Educ., Fiscal Year 2026 Budget Summary 9-10, 16 (2025) https://www.ed.gov/media/document/fiscal-year-2026-budget-summary-110043.pdf.

38 Ward, *supra* note 33.

39 Shawn Healy, *Momentum Grows for Stronger Civic Education Across States*, A.B.A.: Hum. Rts. Mag. (Jan. 4, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-civic-education-in-america/momentum-grows-for-stronger-civic-education-across-states.

40 Annenberg Pub. Pol'y Ctr., Univ. of Penn., *A Majority of Americans Can't Recall Most First Amendment Rights* (Sept. 12, 2024), https://www.annenbergpublicpolicycenter.org/most-americans-cant-recall-most-first-amendment-rights/.

41 Altschuler & Wippman, *supra* note 19; *Results from 2022 NAEP Civics Assessment at Grade 8*, Nat'l Assessment of Educ. Progress, https://www.nationsreportcard.gov/civics/supporting_files/civics_2022_infographic.pdf (last visited July 21, 2025).

42 Inst. of Pol., Harv. Kennedy Sch., *Harvard Youth Poll* (Spring 2025), https://iop.harvard.edu/youth-poll/50th-edition-spring-2025.

respect for the rule of law.[43] We could not agree more. Improving civics education is critical for the future of American democracy and requires immediate action.

Solving America's civics education crisis requires support from lawmakers, educators, and community partners from across the political spectrum. There have been several potential reforms proposed at the federal, state, and local levels that community leaders could support. These reforms would, among other things, increase financial investment in K-12 civics education, modernize and standardize civics curricula in schools, provide training resources to civics educators, develop metrics for assessing students' comprehension and retention of civics concepts, and encourage the adoption of innovative civics-oriented extracurricular programs that promote participation in the democratic process outside of the classroom.

A number of legislative and policy solutions would improve civics education with respect to funding, curriculum, and pedagogy. Many of these solutions have already been implemented in individual states or school districts and could make a difference for the nation if adopted at scale. Below are a few of these model policy innovations:

At the federal level, Congress could pass legislation to substantially increase federal funding for civics education in K-12 public schools. The federal government cannot and should not mandate any specific curriculum or programming. However, it can and should invest in civics education in schools. Greater funding would allow states and localities to adopt stronger civics education programs tailored to the needs of their communities and to accompany those programs with more support for civics educators.[44] In recent years, Congress has considered legislative proposals consistent with the Task Force's recommendation of federal investment with no specific curricular strings attached.

Most notably, the Civics Secures Democracy Act was bipartisan legislation introduced in the House of Representatives in 2021 by Representatives Rosa DeLauro (D-CT), Tom Cole (R-OK), and Earl Blumenauer (D-OR)[45] and in the Senate by Senators Chris Coons (D-DE) and John Cornyn (R-TX).[46] It received endorsements from over 200 civic organizations and would have reversed decades of underinvestment in civics education by authorizing $1 billion annually over five years toward the advancement of high-quality civics and history education in elementary and secondary schools.[47] Specifically, the Act would have provided $585 million in grants to states on the condition that they participate in National Assessments of Educational Progress (NAEP) tests in civics and history and release disaggregated performance data at least once

43 *Civics Secures Democracy Act: Investing in Civic Education to Preserve America's Civic Strength*, CivXNow (2022), https://www.civxnow.org/wp-content/uploads/2022/08/CSD_one_pager_house-1.pdf (noting that out of 1,000 likely voters in a national sample, a majority of both Democrats and Republicans responded that civics education in grades K-12 "would have the *most* positive and meaningful impact on strengthening the American identity").

44 *Id.*

45 H.R. 1814, 117th Cong. (2022).

46 S. 4384, 117th Cong. (2022).

47 *Id.*; *see also Civics Secures Democracy Act*, *supra* note 43.

every two years for grades four, eight, and twelve.[48] To promote local autonomy in our federalist system, states would have been required to spend at least 95% of the funds on subgrants to school districts to help them improve elementary and secondary student achievement in civics and history.[49] The Act would have also provided $200 million in competitive grants for qualified nonprofit organizations to help expand access to civics curricula and instructional models, especially in underserved communities.[50] Further, significant funding would have been provided to institutions of higher education and researchers who evaluate student knowledge of civics and history concepts, instructional practices, and educator professional development. Finally, the Act would have created a new fellowship program to diversify the American History and Civics Teaching Corps.[51]

Other legislation recently considered by Congress would have expanded existing funding channels to support civics programming and development. The Programming, Research, Education, and Preservation in Civics and Government Act,[52] first introduced in 2021, would have increased funding for civics instruction by adding the study of civics and government to the scope of the National Endowment for the Humanities' (NEH) work.[53] According to the bill's sponsors, Representatives Dan Kildee (D-MI) and Ashley Hinson (R-IA), the legislation would have recognized the democratic imperative to fund civics and government education and allowed NEH funding to go towards professional development resources for civics and government teachers, research into civics curriculum improvements, and better educational materials such as online textbooks.[54] Similar proposed legislation, the Constitution Education Is Valuable In Community Schools Act of 2023 (or the "CIVICS Act of 2023"),[55] would have required that national activities supported by the American History and Civics Education program under the Elementary and Secondary Education Act of 1965 encompass the teaching of U.S. history and principles of the Constitution.[56] Further, the USA Civics Act of 2024 aimed to strengthen the Department of Education's competitive grant program for postsecondary civics instruction.[57]

Other legislative proposals have been geared toward eliminating political polarization that can delay progress with respect to civics education. When individuals are deeply divided along partisan lines, it is difficult for

48 *Civics Secures Democracy Act Overview 2022*, CivXNow, https://civxnow.org/wp-content/uploads/2022/03/Civics-Secures-Democracy-Act-Overview-2022.pdf (last visited July 11, 2025).

49 *See id.*

50 *Id.*

51 *Id.*

52 H.R. 1133, 118th Cong. (2023).

53 *Id.*; Press Release, Off. of Rep. Ashley Hinson, Hinson, Kildee Introduce Bipartisan Legislation to Expand Civics and Government Education (May 21, 2021), https://hinson.house.gov/media/press-releases/hinson-kildee-introduce-bipartisan-legislation-expand-civics-and-government.

54 *Id.*

55 S. 2775, 118th Cong. (2023).

56 *Id.*

57 H.R. 9058, 118th Cong. (2024).

them to find the common ground necessary to reach a consensus. The proposed Building Civic Bridges Act[58] would help heal polarized communities and pave the way for the development of effective policy solutions. In particular, this legislation would create an Office of Civic Bridgebuilding within AmeriCorps that would administer a competitive grant program to support civic learning in schools, nonprofits, and public institutions through civic bridgebuilding and community reconciliation.[59] To the extent that AmeriCorps persists despite drastic funding and program cuts during the current administration,[60] this initiative holds great promise. Training school administrators and community stakeholders could facilitate productive conversations between people from different backgrounds about the best ways to reform the civics curriculum of a given school district.

The Task Force also endorses a number of state-level reforms. If Washington will not act, states must take it upon themselves to invest in and reinvigorate their civics curricula.

Substantial variation exists between states' civics educational policies. Rather than provide a comprehensive analysis of all existing policies, we highlight a few exemplary programs that individual states have implemented. We encourage widespread adoption of these initiatives and additional state-level experimentation geared towards strengthening civics curricula.

First, states should consider enhancing civics instructional requirements for all grade levels and introducing students to civics curricula at an earlier age. K-5 teachers report spending an average of only three hours per week on social studies instruction in most states, less than half the time they spend on math.[61] Several states have already taken steps to address the lack of early emphasis on civics education in their schools. For example, New Hampshire passed a law in 2023 entitled "More Time on Civics" that requires a semester of civics in middle school and instructional time for civics in grades K-5, in addition to the half-year instruction in civics and full-year instruction in history and government in high school that was already required for graduation.[62] Similarly, in 2021, Indiana passed a bill that requires public schools to offer a semester of civics to all middle school students.[63] Other states do not mandate an independent civics course, but instead integrate civics concepts into the curriculum of other classes. Idaho

58 S. 4196, 118th Cong. (2024).

59 Press Release, Off. of Rep. Andy Barr, Barr Introduces Legislation to Reduce Polarization and Support Community Bridgebuilding (Mar. 15, 2024), https://barr.house.gov/press-releases?ID=EA5AC6D2-F666-452F-943F-3F5F79180641.

60 Scott MacFarlane, *Trump Administration Cuts to AmeriCorps Causing "Damage and Chaos," Groups Say*, CBS News (May 8, 2025), https://www.cbsnews.com/news/americorps-cuts-trump-administration-terminated-programs/.

61 Sarah Schwartz, *Understanding the Sharp Drop in History and Civics NAEP Scores: 4 Things to Know*, Educ. Wk. (May 4, 2023), https://www.edweek.org/teaching-learning/understanding-the-sharp-drop-in-history-and-civics-naep-scores-4-things-to-know/2023/05.

62 CivXNow, *A Deeper Dive on New Hampshire's Policy Win* (Aug. 29, 2023), https://civxnow.org/new-hampshire-policy/.

63 Casey Smith, *Indiana Adopts New Civics Class for Middle Schoolers*, Ind. Cap. Chron. (June 29, 2022), https://indianacapitalchronicle.com/briefs/indiana-adopts-new-civics-class-for-middle-schoolers/.

provides an illustrative example. While a formal civics course is not offered until high school in the Gem State, civics-related topics, such as the electoral process and methods of public participation, are taught to students from grades K-12.[64] Even in those states in which civics is its own course, a single semester of civics instruction is insufficient to effectively educate students about the country's democratic system of government.

Another step states could take to support civics education in their schools is to offer funding and civics resources to local educational agencies and civics educators. Without support from state governments, many school districts may be unprepared to provide effective instruction in civics, government, and history. States have come up with a variety of ways to make sure that schools have the support they need to be successful. In New York and Ohio, for example, the state education departments provide models, toolkits, and rubrics for local education agencies to use as guidance when assigning and assessing students' civic capstone projects.[65] In Washington State, the state superintendent provides local education agencies with example civics assessments and grants for professional learning in civics, as well as other educational resources.[66] California, Massachusetts, and Tennessee all provide funding to local education agencies for teacher development and to support student civic engagement.[67]

States without strong state-local partnerships need not reinvent the wheel when it comes to developing civics curricula to share with school districts. iCivics—a nonpartisan group founded by former Supreme Court Justice Sandra Day O'Connor—working in collaboration with a network of civics organizations, scholars, educators, practitioners, and students, has developed a blueprint of suggested civics educational strategies, a website of online examples, and a series of implementation recommendations, entitled the *Roadmap to Educating for American Democracy*, that every state and school district can use to meet its respective needs.[68] The *Roadmap* seeks to eliminate confusion regarding the proper substance of history and civics education and to guide national, state, tribal, and local leaders in assessing the adequacy of current practices.[69] Many states could benefit from incorporating the *Roadmap*'s comprehensive guidance into their educational policies.

Before they can teach effectively, educators themselves should receive adequate training and instruction in civics topics. We agree with the recommendations of CivXNow, a cross-partisan coalition of over 335 organizations, which encourage states to strengthen pre-service teaching requirements for civics

64 Sarah Shapiro & Catherine Brown, *A Look at Civics Education in the United States*, Am. Fed'n of Tchrs. (2018), https://www.aft.org/ae/summer2018/shapiro_brown.

65 Charlie Thompson, Learning Pol'y Inst., State Support for Civic Engagement 2 (2023), https://learningpolicyinstitute.org/product/state-support-civic-engagement-report.

66 *Id*. at 12.

67 *Id*. at 2.

68 Educating for Am. Democracy, *supra* note 27, at 2, 7; *see also About Us*, iCivics, https://vision.icivics.org/about/ (last visited July 11, 2025).

69 *Id*.

educators.[70] As CivXNow urges, states should, at a minimum, require educators to take undergraduate courses in U.S. government and U.S. history, revise certification examinations to include more rigorous civics and U.S history requirements, and include preservice methods coursework on the *Roadmap*'s core pedagogical principles.[71] California in particular has demonstrated a commitment to preparing educators to provide high-quality civics instruction by maintaining a budget for professional development for teachers, paid planning time, instructional materials, and personnel costs for service learning coordinators who can help students with the completion of civics-oriented projects.[72]

Finally, states could continue to create innovative programs that advance student learning both in and out of the classroom. In 2022, Utah dedicated $1.5 million over three years to a civics pilot program that authorizes grants to local education agencies that provide teaching in constitutional literacy, media literacy, academic service learning, and experiential simulations of the policymaking process.[73] Colorado has seen immense success in its Judicially Speaking program, which uses interactive exercises and firsthand experience with civics to teach students about a judge's decision-making process.[74] In 2021, Delaware launched a new policy that allows high school students one excused absence from school to participate in a civics-related event.[75] Last year, Alabama's legislature spent $1.75 million to support a partnership between Troy University and the American Village Citizenship Trust to help equip high school students with knowledge of U.S. history and government and to offer teachers a "Civics Education Micro-credential."[76] Kentucky now gives high school students a choice on how to fulfill their civics graduation requirement: They may either take a 100-question test based on the U.S. Citizenship exam or complete a civic literacy course.[77] Also in 2024, New Mexico added an additional semester of social studies and civics to its high school graduation requirements, while Missouri devoted $500,000 to professional development geared towards civics and patriotism.[78]

Colleges and universities should also offer advanced civics education, whether in individual courses, specific curricula, or spread across the curriculum. Every academic, professional, or vocational field of study offers opportunities to reflect on its impact on civil

70 *See Coalition Members*, CivXNow, https://civxnow.org/about/coalition/ (last visited July 11, 2025).

71 These principles include "facilitating student inquiries through analysis and investigations; discussion and debates; literacy; use of experiential learning; classroom-based practices of constitutional democracy; project-based learning; and use of formative assessments for purposes of student reflection and instructional improvements." CivXNow, CivXNow State Policy Menu 7 (2024), https://civxnow.org/wp-content/uploads/2024/11/CivxNow_State_Policy_Menu.pdf.

72 Thompson, *supra* note 65, at 2.

73 *See* H.B. 273, 2022 Gen. Sess. (Utah 2022), 2022 Utah Laws 229.

74 Lindsey Bailey, *Six States with Exemplary Civics Education Programs*, PopEd Blog (Aug. 18, 2021), https://populationeducation.org/six-states-with-exemplary-civics-education-programs.

75 *Id*.

76 *Continued Progress on Civics Policies Across States*, CivXNow (June 3, 2024), https://civxnow.org/continued-progress/.

77 *Id*.

78 *Id*.

society.[79] Universities are important agents in American society and should provide means for America's youngest adults to engage deeply with civics education.

B. Citizen Redistricting Commissions

Redistricting is the process of redrawing the geographic districts for federal and state legislators. In most states,[80] redistricting happens on a 10-year cycle following the decennial census.[81] Historically, districts have been drawn by the very state legislators who run them. Although redistricting is necessary to respond to population shifts, the politicized nature of the process means that the dominant party can gerrymander, manipulating district lines to increase its hold on power.[82] In recent days, political forces in some states have become even more aggressive, seeking to redraw congressional districts mid-decade, for partisan political purposes, before the 2026 midterm elections.[83] Critics characterize this arrangement as politicians picking their voters, not the other way around.[84] The Task Force believes that redistricting should be taken out of the hands of legislators and committed to commissions composed of non-partisan citizens.

PROBLEM STATEMENT

In most states, the power to redistrict is vested solely in the legislature. Internationally, the United States is an extreme outlier in this regard, as the only long-term democracy where redistricting is exclusively authorized to be effected by politicians.[85] While Congress has authority to regulate federal elections, it has not mandated specific procedures for congressional districting, and there are few impediments in federal law to prevent state

79 *See*, *e.g.*, Ellen Condliffe Lagemann and Harry R. Lewis, *Renewing Civic Education*, Harv. Mag. (Sept. 4, 2023), https://www.harvardmagazine.com/2012/02/renewing-civic-education.

80 In this section, the term "state" refers to all jurisdictions in the United States that have elected representatives or congressional delegations, and the term "legislative districts" refers only to state legislative districts, not congressional districts.

81 *See* Sarah J. Eckman, Cong. Rsch. Serv., R45951, Apportionment and Redistricting Process for the U.S. House of Representatives 1 (2021).

82 *See* Kirkpatrick v. Preisler, 394 U.S. 526, 528 (1969) (defining gerrymandering as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purpose").

83 *See, e.g.*, Kayla Guo and Gabby Birenbaum, *Why the proposed Texas congressional map may not be a lock to net five new GOP seats,* The Texas Tribune (July 31, 2025).

84 *See* Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, Brennan Ctr. For Just. (Aug. 10, 2021), https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained (last updated June 9, 2023) ("Rather than voters choosing their representatives, gerrymandering empowers politicians to choose their voters.").

85 *See* Bernard Grofman & German Feierherd, *The U.S. Could be Free of Gerrymandering*, Wash. Post (Aug. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/07/the-supreme-court-will-soon-consider-gerrymandering-heres-how-changes-in-redistricting-could-reduce-it.

legislatures from gerrymandering.[86] The only federal statutory protection is the Voting Rights Act, which explicitly prohibits racially discriminatory gerrymandering,[87] and the courts' interpretation of the constitutional requirement of the "one person, one vote" principle, which stipulates that all votes must be weighted approximately equally and therefore that all districts within a state or municipality must have equal populations.[88] The Supreme Court recently held that partisan gerrymandering is a non-justiciable political question, meaning that the Constitution provides no inherent protection against even the most viciously partisan gerrymanders.[89]

Gerrymandering, especially partisan gerrymandering, violates an important principle of democratic rule by undercutting the fairness of representational democracy.[90] Inherently, gerrymandering favors incumbents.[91] Once a legislator is elected, she has little incentive to destroy the very system that got her there. Most significantly, gerrymandering contributes to political polarization by replacing inter-party competition with intraparty competition that tends to reward candidates with more extreme views.[92] In California, for instance,

86 *See* U.S. Const. art. I, § 4, cl. 1; *see also* Cong. Rsch. Serv., R44798, Congressional Redistricting Law: Background and Recent Court Rulings 2–4 (2017). Many states impose additional restrictions, such as contiguity, see, e.g., Alaska Const. art. VI, § 6, and maintaining communities of interest, see, e.g., N.Y. Const. art III, §4(c)(5).

87 *See* 52 U.S.C. § 10301 ("No . . . standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."). But in a recent opinion, the Supreme Court held that to prove unconstitutional racial gerrymandering, a plaintiff must show that race was the "predominant factor motivating the legislature[]" and judges should presume legislative good faith. *See* Alexander v. South Carolina State Conference of the NAACP, 602 U.S. 1, 2 (2024) (internal quotation marks omitted) (quoting Miller v. Johnson, 515 U. S. 900, 916 (1995)). The Court will return to the question of racial gerrymandering in its next term. Nina Totenberg, *Supreme Court Postpones Louisiana Redistricting Case to Next Term*, NPR (June 27, 2025), https://www.npr.org/2025/06/27/nx-s1-5423776/supreme-court-louisiana-redistricting.

88 *See* Nat'l Conf. of State Legislatures, Redistricting Law 23 (2019). Congressional districts must be strictly equal in size. *See* Wesberry v. Sanders, 376 U.S. 1, 7 (1964). Legislative districts are only bound to maintain "substantial equality" and are permitted greater variability between districts. *See* Reynolds v. Sims, 377 U.S. 533, 568–69 (1964).

89 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

90 *See* Bruce E. Cain, Democracy More or Less 122 (2015).

91 *See* Michael Li, Peter Miller & Madison Buchholz, *How Gerrymandering Tilts the 2024 Race for the House*, Brennan Ctr. For Just. (Sept. 24, 2024), https://www.brennancenter.org/our-work/research-reports/how-gerrymandering-tilts-2024-race-house ("Democrats were able to take an existing gerrymandered map and tweak it to shore up incumbents....").

92 *See* Richard H. Pildes, *Political Reforms to Combat Extremism*, A.B.A. (May 6, 2024), https://www.americanbar.org/groups/public_interest/election_law/american-democracy/our-work/political-reforms-combat-extremism/ [hereinafter Pildes, Political Reforms] (discussing perspectives on the subjective effects of "safe" seats on the politics of incumbents). *See also* Cassandra Handan-Nader et al., Stanford Inst. for Econ. Pol'y Rsch., Polarization and State Legislative Elections 3 (2022) ("[C]ontested general elections have weakly favored more-moderate candidates."); David G. Odel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship*, 54 Vill. L. Rev. 57, 82-84 (2009) (discussing empirical findings suggesting that

only a single congressional seat changed hands between the two major parties in more than 250 elections during the decade following the 2000 redistricting.[93] Studies reveal that representatives from safe seats work on less legislation than their peers,[94] and legislatures that are polarized pass fewer laws.[95] In all, politicians in safe, heavily gerrymandered districts must compete for the most ideologically extreme share of primary voters, and once elected, they have little incentive to reach across the aisle and engage in effective governance or represent responsible policy positions.

Politicized redistricting has deepened over time; in the 1970s, 33% of congressional districts were competitive, but by the 2010s, only 14% remained so.[96] Following the redistricting based on the 2020 census, just 7% of Congress is elected from competitive districts.[97] Many states have lost almost all of their competitive congressional districts.[98] The incorporation of sophisticated mapping technology and big data enables extremely precise gerrymanders.[99]

Overall, politicized redistricting is an important driving force in the crisis of democracy in the United States; it is at the core of political dysfunction and polarization today. Americans are losing confidence that their elected representatives speak for them. Those representatives are less and less incentivized to govern effectively, thereby

partisanship in the legislature declined in several states after the introduction of redistricting commissions). The opposite may also true, as some data suggest representatives, regardless of party affiliation, change their voting patterns in response to changes in their electorate. *See* Daniel B. Jones & Randall Walsh, *How do Voters Matter? Evidence from US Congressional Redistricting*, 158 J. Pub. Econ. 25, 37 (2018).

93 *See* Adam Nagourney, *California Set to Send Many New Faces to Washington*, N.Y. Times (Feb. 13, 2012), https://www.nytimes.com/2012/02/14/us/california-congressional-delegation-braces-for-change.html.

94 *See* Aryanna Hyde & Edwin Santana, *Gerrymandering, Turnout, and Lazy Legislators*, MIT Election Data + Sci. Lab (Sept. 3, 2021), https://electionlab.mit.edu/articles/gerrymandering-turnout-and-lazy-legislators (finding that congresspeople from the independently drawn districts sponsored more bills than their peers from politician drawn districts).

95 *See* Jake Zuckerman, *2023 Could be Ohio's Slowest Lawmaking Year Since 1955 (At Least)*, Cleveland.com (Nov. 10, 2023), https://www.cleveland.com/open/2023/11/2023-could-be-ohios-slowest-lawmaking-year-since-1955-at-least.html; Moira Warburton, *Why Congress is Becoming Less Productive*, Reuters (Mar 12, 2024), https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/.

96 *See* Alan I. Abramowitz, *Redistricting and Competition in Congressional Elections*, Ctr. for Pol. (Feb. 24, 2022), https://centerforpolitics.org/crystalball/redistricting-and-competition-in-congressional-elections/.

97 *See* Richard H. Pildes, *Create More Competitive Districts to Limit Extremism*, Real Clear Pol. (April 19, 2021), https://www.realclearpolitics.com/articles/2021/04/29/create_more_competitive_districts_to _limit_ extremism_145672.html.

98 *See* Michael Li & Gina Feliz, *The Competitive Districts that Will Decide Control of the House*, Brennan Ctr. For Just (Oct. 24, 2024), https://www.brennancenter.org/our-work/analysis-opinion/competitive-districts-will-decide-control-house. In the 2024 election, only 27 of 435 districts were deemed competitive. *Id.*

99 *See* Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 Duke J. Const. L. & Pub. Pol 69, 77–79 (2010).

feeding the perception that democratic governance is ineffective.

Efforts are underway in various states to create independent, citizen redistricting commissions. As of 2021, eighteen states have some form of congressional redistricting commission, but they vary widely in structure and composition.[100] We endorse these efforts.

There are three kinds of redistricting commissions: primary, advisory, and backup commissions. Primary commissions have the power to enact legislative maps without any consultation or input from the legislative branch.[101] Fifteen states vest primary power for state legislative redistricting in some form of commission, and ten do the same for congressional districts.[102] Advisory commissions are empowered to propose maps to the legislature for approval.[103] In some states, the legislature is only permitted to vote up or down on the proposed map without amending it,[104] which tends to give the commission more power, but in others, the commission is purely advisory.[105] Five states have advisory commissions for state legislative districts and four for congressional districts.[106] Backup commissions are only activated if the legislature fails to pass a redistricting plan by a specified deadline. Five states have such a commission for legislative redistricting, and three do so for congressional redistricting.[107]

Citizens, not sitting officeholders, have responsibility for redistricting in some capacity in nine states. Arizona, California, Colorado, and Michigan use independent citizen commissions composed solely of registered voters who are not involved in any way with organized politics beyond registered party membership.[108] The citizen commissioners are selected through methods that insulate the process from direct control by partisan public officials. Several of these

100 These statistics were last updated in December 2021. *See Redistricting Commissions: Congressional Plans,* Nat'l Conf. of State Legislatures (Dec. 10, 2021), https://www.ncsl.org/redistricting-and-census/redistricting-commissions-congressional-plans.

101 *See* Ruth Greenwood et al., Campaign Legal Ctr., Designing Independent Redistricting Commissions 11 (2018).

102 *See Redistricting Commissions: State Legislative Plans*, Nat'l Conf. of State Legislatures (Dec. 10, 2021), https://www.ncsl.org/redistricting-and-census/redistricting-commissions-state-legislative-plans; *Redistricting Commissions: Congressional Plans*, supra note 100. The legislature retains the power to redraw congressional districts in Arkansas, Missouri, Ohio, and Pennsylvania. *See id.* Alaska has only one at-large congressional district. *See id.*

103 *See* Greenwood et al., *supra* note 101, at 12.

104 *See*, *e.g.*, N.Y. Const. art. III, §4(b) (providing that the assembly must pass the redistricting plan passed by the commission in its entirety, and if it is rejected or vetoed by the governor, the commission gets an opportunity to propose another map).

105 *See*, *e.g.*, Vt. Const. Ch. 2, § 73.

106 *See Redistricting Commissions: State Legislative Plans*, *supra* note 102; *Redistricting Commissions: Congressional Plans*, *supra* note 100.

107 *See Redistricting Commissions: State Legislative Plans*, *supra* note 102; *Redistricting Commissions: Congressional Plans*, *supra* note 100.

108 For the Arizona commission, see Ariz. Const. art. 4, pt. 2, § 1 (3)-(8). For the California commission, see Cal. Const. art. XXI § 2(c) (discussing structure of the commission) and Cal. Gov't Code § 8252 (discussing particulars of the selection process). Colorado has separate commissions for congressional and state legislative districts, but they

states use elaborate procedures, including both merit-based and lottery procedures, to produce a qualified and impartial panel of commissioners.[109] Montana, Washington, Alaska, and Idaho employ semi-independent citizen commissions where the commissioners may not be public officeholders, but all or most of them are selected directly by politicians.[110] The Virginia redistricting commission is composed of sixteen members, of whom half are legislators, selected by the legislative caucuses and political parties, and half are non-officeholding citizens, selected through a collaborative process between the judiciary and the legislature.[111] Many states also prohibit commissioners from serving as representatives from the districts they have drawn for some period of time after the reapportionment.[112]

The partisan structure of redistricting commissions is also important. Commissions can be either strictly partisan, as in New York and Virginia, or include partisans and independents, as in California and Arizona. Commissions with a partisan balance, particularly if they require a supermajority to enact a map, risk being deadlocked by partisan dynamics.[113] This is particularly true where a supermajority of the commission is required to enact a redistricting plan.[114]

Also important are the perspectives and purposes that guide state redistricting commissions. Broadly, there are two ways to achieve a so-called "fair" legislative district: (1) process-oriented, "partisan blind" redistricting, or (2) outcome-oriented redistricting.[115] States generally require redistricting commissions to consider specific factors, albeit with different priorities.[116] California, for instance, puts strong emphasis on objective factors like geographic integrity

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are the same in all particulars. *See* Colo. Const. art. V, § 44.1 (congressional districts); *id*. at art. V, § 47 (legislative districts). For Michigan, see Mich. Const. Art. IV, § 6.

109 *Compare* Mich. Const. Art. IV, § 6(1)(b) (Secretary of State randomly selects a panel of potential commissioners that is weighted to represent the state's geography and demography, and the final commission is also selected entirely at random, with only a limited number of strikes permitted by the legislature) *with* Colo. Const. art. V, § 44.1(8) (requiring the selection committee to consider the abilities and qualifications of the applicants including "analytical skills, the ability to be impartial, and the ability to promote consensus on the commission" before final round of random selection) *and* Cal. Gov't Code § 8252(d) (requiring the selection committee to vet applicants in a similar manner before random selection).

110 *See* Mont. Const. art. V, § 14; Wash. Const. art. 2, § 43(3); Alaska Const. art. 6, § 8; Idaho Const. art. III, § 2(2).

111 *See* Va. Const. art. II, § 6-A(b); Va. Code § 30-394.

112 *See*, *e.g.*, Haw. Const. art IV, § 2 (prohibiting commissioners from running for election to congress or the legislature in the subsequent two election cycles); Idaho Const. art. III, § 2(5) (doing the same for a period of five years).

113 *See* Greenwood et al., *supra* note 101, at 26–27.

114 *See* David Tatsuo Imamura, *The Rise and Fall of Redistricting Commissions: Lessons from the 2020 Redistricting Cycle*, A.B.A.: Hum. Rts. Mag. (Oct. 24, 2022), https://www.americanbar.org/groups/crsj/resources/human-rights/archive/rise-fall-redistricting-commissions-lessons-2020-redistricting-cycle/.

115 *See* Richard Pildes, *Redistricting Reform and the 2018 Elections*, Harv. L. Rev. Blog (Oct. 26, 2018), https://harvardlawreview.org/blog/2018/10/redistricting-reform-and-the-2018-elections/.

116 *See* Greenwood et al., *supra* note 101, at 37–45.

of communities of interest.[117] Arizona has similar standards, but also suggests that the commission should try to create competitive districts where possible.[118] States like Colorado and Missouri put a much greater emphasis on competitiveness as a guiding value for the redistricting process.[119] Regardless of the specific approach employed, it is crucial that the redistricting commission be charged with some set of principles in order to provide standards for evaluating the fairness of the result.[120]

Most states also require that the commission open its work to the public in several ways. Traditional legislature-based redistricting is essentially a black box; except in the event of litigation, its internal processes are knowable only through the fruits of the process and any information that the political participants voluntarily disclose. Although there may be debates on the floor of a state house, backroom deals shape outcomes. The commission model, even when the commission does not have the power to enact its own maps, significantly increases transparency by requiring things like open meetings and reports that detail how the districts were drawn.[121] If the legislature chooses to deviate significantly from an advisory commission's proposed districts, it is easy for the public to understand the intent and effect of the gerrymandering.

In all cases, the establishment of non-legislative redistricting commissions requires a state constitutional amendment.[122] As of 2021, five states, including all of the states with independent citizen commissions, had accomplished this through citizens' initiative procedures.[123] Notably, only eighteen states permit citizen-initiated constitutional amendments.[124] The self-interest of incumbent

117 *See* Cal. Const. art. XXI § 2(d).

118 *See* Ariz. Const. art. 4, pt. 2, § 1(14).

119 The Colorado commission is directed to "solicit evidence relevant to competitiveness of elections in Colorado and shall assess such evidence in evaluating proposed maps." Colo. Const. art. V, § 44.3 (3)(b). The preamble to this section emphasizes the importance of competitiveness as a guiding principle: "competitive elections for members of the united states house of representatives provide voters with a meaningful choice among candidates, promote a healthy democracy, help ensure that constituents receive fair and effective representation, and contribute to the political well-being of key communities of interest and political subdivisions." *Id.* at art. V, § 44(1)(d). In Missouri, the commission must draw districts have achieve both "partisan fairness," meaning "that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency," and "Competitiveness," meaning "that parties' legislative representation shall be substantially and similarly responsive to shifts in the electorate's preferences." Mo. Const. art III, § 3(b)(5).

120 *See* Cain, supra note 90, at 129.

121 *See, e.g.*, Mo. Const. art III §§ 3(b)(5)(d)-(f) (commission required to hold three public meetings before disclosure of proposed map, publish all demographic data underlying maps, and hold a hearing to take comments from the public on proposed map).

122 *See Creation of Redistricting Commissions*, Nat'l Conf. of State Legislatures (Dec. 10, 2021), https://www.ncsl.org/redistricting-and-census/creation-of-redistricting-commissions.

123 *See id.*

124 *See Initiated Constitutional Amendment*, Ballotpedia, https://ballotpedia.org/Initiated_constitutional_amendment (last visited May 30, 2025). One issue that arises with respect to citizen's initiatives is deceptive

legislators serves as an impediment to this reform in the states that require a supermajority or repeated legislative consent to amend the constitution.[125]

Polls reveal that most voters across the political spectrum disapprove of gerrymandering and support the creation of independent redistricting commissions to remove control of redistricting from politicians.[126]

PROPOSED SOLUTIONS

The Task Force endorses the ABA's own prior recommendations for redistricting reform. In 2008, the ABA House of Delegates formally adopted a resolution calling for all jurisdictions in the United States to institute independent commissions with authority to conduct congressional and state legislative redistricting.[127] Although it leaves the exact form of the commission and criteria for redistricting to the individual states, the report accompanying the ABA resolution suggested that commissions should be either non-partisan, composed of non-politicians, or bipartisan, composed of an equal number of politicians from both parties.[128] It also noted many of the same problems discussed *supra*

ballot language. In 2024, Ohio voters rejected a ballot proposal that would have established a citizen-led redistricting commission. *See* Julie Carr Smyth, *Ohio Voters Reject Replacing Troubled Mapmaking System with Citizen-Led Redistricting Commission*, AP News (Nov. 6, 2024), https://apnews.com/article/election-2024-redistricting-ballot-measure-ohio-af8ae51957bfb3086250f6ed7e2b0646. Proponents of the measure blamed misleading ballot language, which stating that the new commission would be "required to gerrymander," for their loss. *Id*. (internal quotation marks omitted). The Ohio Republican Party Chairman Alex Triantafilou later stated, "Confusing Ohioans was not such a bad strategy." Roger LaPointe, *Ohio GOP Chair: 'Confusing Ohioans Was Not Such a Bad Strategy'*, Fremont News Messenger (Jan. 14, 2025), https://www.thenews-messenger.com/story/news/local/2025/01/14/ohio-gop-chair-brags-confusing-ohioans-during-election/77669351007/ (internal quotation marks omitted).

125 *See* Cain, *supra* note 90, at 122.

126 *See* RepresentUS, National Polling: Voters See Gerrymandering as a Major Problem, Want Reform (Aug. 4, 2021), https://represent.us/wp-content/uploads/2021/08/RepUS-Polling-Memo-080221.pdf; Corey Goldstone, *Poll: 57% of Republicans Support Independent Redistricting Commissions*, Campaign Legal Ctr. (Mar. 9, 2021), https://campaignlegal.org/update/poll-57-republicans-support-independent-redistricting-commissions. While one poll suggests that most voters don't feel strongly about gerrymandering, this finding may evince widespread unawareness rather than acceptance. *See* Bradley Jones, *With Legislative Redistricting at a Crucial Stage, Most Americans Don't Feel Strongly About It*, Pew Rsch. Ctr. (Mar. 4, 2022), https://www.pewresearch.org/short-reads/2022/03/04/with-legislative-redistricting-at-a-crucial-stage-most-americans-dont-feel-strongly-about-it/.

127 *See* Michael Asimow, A.B.A., Redistricting by Independent Commission (2008), https://www.americanbar.org/groups/public_interest/election_law/policy/08m102a/. In 1991, the ABA adopted a resolution supporting "fair redistricting." Although the resolution suggested reforms to make the process of legislative redistricting more open to the public, it stopped well short of recommending that redistricting be removed from state legislatures. *See* Sec. Comm. on Elec. L., A.B.A., Redistricting (2008), https://www.americanbar.org/groups/public_interest/election_law/policy/91m109/.

128 *See id*.

and emphasized the value of the ABA endorsing the concept as a non-partisan entity.[129]

As discussed above, redistricting commissions exist on a spectrum from independent citizen commissions with full power to implement districting maps, down to politician commissions with the same power, all the way to backup commissions that only act during legislative breakdowns. However, commissions made up of citizens who are insulated from professional politics and selected without input from politicians are the most likely to create districts that give voters a real opportunity to choose their representatives and incentivize those representatives to take positions that have broad appeal among their constituents. In the same vein, the Task Force recommends that redistricting commissions be given authority to enact the maps they draw. Although some advisory commissions are respected by the legislature as a matter of course, in many other cases, the legislature ignores advisory maps and draws its own.[130] Commissions that have the power to execute their own maps are more likely to institute effective reforms.

The Task Force also recommends that all states instituting redistricting commissions carefully consider the standards they must follow. One of the main problems with legislature-based redistricting, discussed above, is that there are few legal constraints on the outputs of the process. Stakeholders in all states will need to consider what values are most important and understand that tradeoffs will need to be made. Most states place a strong premium on keeping sub-state political entities like counties, cities, and towns within the same district, but this is in direct tension with the goal of promoting intraparty competition.[131] Likewise, some states require commissions to maintain the integrity of "communities of interest,"[132] but these kinds of areas can be difficult to define with precision, which might make such standards harder to enforce or challenge in court. Overall, the Task Force urges the ABA to build on its current policy, adopted in 2008, to support independent redistricting commissions by studying existing models and assisting states in identifying commission structures ideal for their situations.

The Task Force also recommends that lawyers themselves take steps to become involved in redistricting reform in their home states. Citizens have led successful redistricting

129 *See id.*

130 *Compare* Greenwood et al., *supra* note 101, at 12 (discussing the deference the Iowa legislature gives to maps drawn by the well-respected, non-partisan advisory commission) *with Utah*, All About Redistricting (Aug. 14, 2023), https://redistricting.lls.edu/state/utah (state legislature explicitly rejected recommendation of independent commission to create a single district in Salt Lake City, instead splitting its voters among four otherwise republican districts).

131 *See* Stephen Ansolabehere & Christopher T. Kenny, *Democracy Reform Primer Series: Redistricting Process Reform*, Univ. of Chi. Ctr. for Effective Gov't (Feb. 20, 2024), https://effectivegov.uchicago.edu/primers/redistricting-process-reform ("Balancing so many criteria complicates the task of the map-drawer, and, ultimately, tradeoffs must be made.").

132 *See* Edward W. Plaut & Elizabeth Powers, *Crystalizing Community: "Communities of Interest" and the 2020 Michigan Independent Citizens Redistricting Commission*, 57 U. Mich. J. L. Reform 611, 613 (2024).

reform movements,[133] but politicians and political party apparatuses across the country are strongly resistant to any reforms that hamper their ability to control redistricting. In the past, they have argued that redistricting commissions were unconstitutional, but the Supreme Court roundly rejected this argument.[134] They continue to frustrate even successful ballot measures[135] and, when faced with independent redistricting, attempt to influence the process covertly.[136] Advocates of legislature-based redistricting have offered a variety of spurious rationales, suggesting that redistricting reform is a covert partisan effort by the minority party to hijack state politics, a needlessly complex bureaucratic process that empowers unelected officials to subvert the will of the people, an imposition by outside forces and shadowy donors, and an affront to minorities.[137] For the most part, however, these arguments are unsubstantiated and overlook the fundamental conflicts of interest and unfairness described above.

One last point: even if states resist creating truly independent commissions, they can nevertheless mitigate the partisanship of redistricting by enacting constitutional provisions that bar partisan or incumbency considerations when new lines are drawn. States as different as Florida and New York have done so.[138]

133 *See, e.g.*, Nancy Wang, *How Michigan Voters Came Together to Flip Gerrymandering On Its Head*, Campaign Legal Ctr. Blog (Oct. 16, 2019), https://campaignlegal.org/story/how-michigan-voters-came-together-flip-gerrymandering-its-head (discussing central role of non-partisan, grassroots organization Voters Not Politicians in success of campaign for independent redistricting commission in Michigan).

134 *See* Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 787 (2015).

135 *See, e.g.*, Smyth, *supra* note 124; Benjamin Wood, *Bill Changing Redistricting Initiative Sails Through Utah Senate Committee*, Salt Lake Trib. (Mar. 2, 2020), https://www.sltrib.com/news/politics/2020/03/02/bill-changing.

136 *See, e.g.*, Olga Pierce & Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, ProPublica (Dec. 21, 2011), https://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission (describing how Democratic party operatives tried to covertly influence districting by making presentations to the redistricting commission while posing as members of a non-partisan good-government group); Bente Birkeland, *Redistricting Was Supposed To Be Less Partisan In Colorado. Politics Are Getting In The Way Of That*, CPR News (Aug. 26, 2021), https://www.cpr.org/2021/08/26/redistricting-was-supposed-to-be-less-partisan-in-colorado-politics-are-getting-in-the-way-of-that/ (discussing allegations that politicians had improperly met privately with redistricting commissioners to attempt to influence the outcome of the process).

137 For representative examples of anti-reform rhetoric, *see, e.g.*, Susan Tebben, *Ohio Senate President, Redistricting Reform Supporters, Trade Criticisms in Post-Primary Event*, Ohio. Cap. J. (Mar. 22, 2024), https://ohiocapitaljournal.com/2024/03/22/ohio-senate-president-redistricting-reform-supporters-trade-criticisms-in-post-primary-event/; Susan Myrnick, '*Nonpartisan*' *Redistricting Is Just a Fantasy*, Civitas Inst. (Jan. 25, 2017), https://www.nccivitas.org/2017/nonpartisan-redistricting-just-fantasy/; Samuel Lair, *The False Promises of 'Independent' Redistricting Commissions*, Real Clear Pol'y (Feb 22, 2022), https://www.realclearpolicy.com/articles/2022/02/22/the_false_promises_of_independent_redistricting_commissions_817937.html.

138 *See* Fla. Const. art. III, §§ 20–21; N.Y. Const. art. III §§ 3–4.

C. Open, Nonpartisan Primaries/Ranked Choice Voting/Fusion Voting

In a properly functioning democracy, elections result in leaders chosen who receive the highest number of votes and therefore have the greatest level of public support among all candidates. Ideally, to ensure effective governance, elected leaders would enjoy not only the greatest level of support from voters but majority support from the electorate. Majority support indicates that leaders are more likely to represent the aggregate preferences of their constituents, resulting in policies and decisions that are aligned with what most constituents want. In most states, the process of electing leaders begins with party primaries. It is there that voters get their first chance to select who will be eligible to be elected. But too often party primaries fail to adequately capture majority sentiment.

PROBLEM STATEMENT

The way in which most states conduct primaries for both state and federal elections incentivizes and rewards candidates who lack the support of the majority of the electorate. Because party primaries' generally low turnout means that hyper-partisans tend to dominate, candidates who are successful are those who have taken more extreme positions to win.[139] This relatively small yet highly motivated segment of voters is able to effectively nominate candidates to advance to the general election without necessarily taking into consideration whether such candidates appeal to the majority of the electorate. When these candidates prevail in the general election, most often with just a plurality of the vote, they may feel bound to govern in a highly partisan manner that appeals to their original, narrow base of support. This undermines the democratic principle of representative government.

In 2022, only 21.3% of all eligible voters in this country participated in primaries.[140] Primary turnout is often less than half of the turnout for general elections, which, in 2022, for example, was 46 percent.[141] In 2024, only approximately 10% of registered voters cast a ballot in the presidential primaries.[142] Such low primary turnout is consistent across states, including in states in which the dominant party's primary was outcome determinative

139 *See* Pew Rsch. Ctr., Political Polarization in the American Public 76 (2014) (finding that approximately twice the number of voters who hold "consistently liberal" or "consistently conservative" views vote in primaries as compared to voters with "mixed" views); Nick Troiano, The Primary Solution: Rescuing Our Democracy from the Fringes 79 (2024) ("Primary voters tend to be much more partisan than the electorate as a whole.").

140 *See* Joshua Ferrer & Michael Thorning, Bipartisan Pol'y Ctr., 2022 Primary Turnout: Trends and Lessons for Boosting Participation 7 (2023).

141 *See* Hannah Hartig et al., Pew Rsch. Ctr., Republican Gains in 2022 Midterms Driven Mostly by Turnout Advantage 11 (2023).

142 Amy B Wang, Lenny Bronner & Patrick Svitek, *Ten Percent of the Voters Have Spoken: Biden, Trump Clinch Nominations*, Wash. Post (Mar. 13, 2024), https://www.washingtonpost.com/politics/2024/03/13/few-voters-decide-trump-biden-nominations/. Approximately 23% of registered voters cast a ballot in primary contests held through April 24, 2024. Press Release, Vote at Home (Apr. 25, 2024), https://voteathome.org/nearly-4-in-5-registered-voters-failed-to-cast-a-ballot-in-2024-primaries-highest-turnout-seen-in-vote-at-home-states/.

for the general election.[143] The reasons for low primary voter turnout are many and varied: perceived lower stakes of primaries; greater costs of voting in the absence of a state or federal holiday; less social pressure to vote in primaries; rules regarding who should participate in primaries; greater willingness to defer to perceived experts or those who are passionate about certain issues implicated by primaries; and less media attention over a longer time leading up to primaries.[144] These factors compound to result in primary voters being more partisan and ideologically motivated than the typical voter.[145] Primary voters also tend to be "older, wealthier, and whiter, and they have higher levels of political knowledge."[146]

Candidates respond to such skewed primary electorates. Attempting to appeal to a voter base that is more partisan and extreme than the general electorate, candidates take more partisan and extreme stances while campaigning. Further downstream, moderate candidates, confident in their lack of chances of electoral success, are dissuaded from running in the first place.[147] Similarly, moderate incumbents increasingly choose not to seek reelection out of fear of being primaried.[148]

Not only are candidates incentivized by the current partisan primary system to take more extreme stances if they choose to run, but more and more ideologically extreme candidates are rewarded with electoral success in the current partisan primary system.[149] In large part, this is because the winning candidate in most states for most elections needs only to receive a plurality of votes.[150] Indeed, winning with a plurality, particularly in primaries in which "votes are often split between many

143 *See* Troiano, *supra* note 139, at 76 (citing voter turnout of just 19.5 percent in "states in which the dominant party's primary was the only election of consequence for governor or Senate").

144 *See* Alan S. Gerber et al., *Why Don't People Vote in U.S. Primary Elections? Assessing Theoretical Explanations for Reduced Participation*, 45 Electoral Studies 119, 119 (2017).

145 *See* Pew Rsch. Ctr., Political Polarization, *supra* note 139, at 76 (finding that approximately twice the number of voters who hold "consistently liberal" or "consistently conservative" views vote in primaries as compared to voters with "mixed" views); Troiano, *supra* note 139, at 79.

146 *See* Pildes, Political Reforms, *supra* note 92. Although the recent New York City primary election demonstrated that under the right conditions, a younger demographic can be incentivized to participate. *See* Emma G. Fitzsimmons, Alex Lemonides & Irineo Cabreros, *How Zohran Mamdani Brought New Voters to the Polls*, N.Y. Times (June 30, 2025), https://www.nytimes.com/2025/06/29/nyregion/zohran-mamdani-voters-strategy.html.

147 *See* Chapman Rackaway & Joseph Romance, Primary Elections and American Politics 167 (2022) ("Ideological moderates also see no point in entering contests that naturally push them out to the extremes. Moderate voices tend to opt against running in partisan races specifically because they know that they will not be competitive in primary elections that intrinsically favor extreme candidates and viewpoints."); Danielle M. Thomsen, *Ideological Moderates Won't Run*, 76 The J. of Pol. 786 (2014).

148 *See* Pildes, Political Reforms, *supra* note 92.

149 *See* Drew Desilver, *The Polarization in Today's Congress Has Roots that Go Back Decades*, Pew Rsch. Ctr. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ (estimating that there were 160 moderates in Congress in the early 1970s, but only about two dozen today).

150 *See* Troiano, *supra* note 139, at 87.

candidates," is a frequent occurrence.[151] The candidate who receives a plurality will be the one who most appeals to the skewed primary electorate, thus rewarding extremism.

The extremism incentivized and rewarded in the current partisan primary system is only compounded once elected candidates take office. Officials who are highly partisan tend to shape the policy preferences of their parties.[152] They emphasize and legislate around identity differences and cultural issues, which they believe reflect their mandate.[153] In other words, highly partisan officials refuse to search for common ground with those on the other side of the aisle because they have been politically disincentivized from doing so.

This refusal to compromise is not limited to extreme partisans; it has become accepted, whether willingly or not. The prevailing view among incumbents, even those who may be ideologically moderate, is that primary voters will punish them for compromising with the other party.[154] Therefore, when incumbents fear a primary challenge, they are careful to avoid compromise on controversial issues about which their primary constituency cares.[155]

Furthermore, voters increasingly vote not for their party but against the other party.[156] Moreover, "sore loser laws," which exist in all but three states for all non-presidential elections, block candidates who lose in the primary from running in the general election.[157] Primaries thus pose the only meaningful electoral challenge and accountability measure for many incumbents.[158] While only a fraction of Congress faces a meaningful primary challenge in any given election, primary challenges have become more common and are more likely to come from ideological extremes than they previously

151 *See Research and Data on RCV in Practice*, FairVote, https://fairvote.org/resources/data-on-rcv/ [hereinafter FairVote, Research and Data on RCV] (last visited June 5, 2024); *see* Troiano, *supra* note 139, at 87 (internal citations omitted) (describing how in 2022, out of thirty congressional primaries for open seats in safe districts, eleven of the districts were won by a candidate who received a plurality of the votes); Jason Harrow & Victor Shi, *The Magic of Majority Rule in Elections*, The Hill (Aug. 16, 2019), https://thehill.com/blogs/congress-blog/politics/457749-the-magic-of-majority-rule-in-elections/ ("Since 1992, 49 senators from 27 states have been elected with less than 50 percent support."); Pildes, Political Reforms, *supra* note 92 ("[I]n open-seat primaries, about 36% of primaries are won with only a plurality of the vote.").

152 *See* Pildes, Political Reforms, *supra* note 92.

153 *See id.* at 2–3.

154 *See generally* Sarah E. Anderson, et al., Rejecting Compromise: Legislators' Fear of Primary Voters (2020); Troiano, *supra* note 139, at 7.

155 *See* Elaine C. Kamarck & James Wallner, Brookings, *Anticipating Trouble: Congressional Primaries and Incumbent Behavior*, 156 R St. Pol'y Study 1, 7 (2018); Pildes, Political Reforms, *supra* note 92.

156 *See* Pildes, Political Reforms, *supra* note 92; *see* Pew Rsch. Ctr., As Partisan Hostility Grows, Signs of Frustration with the Two-Party System 7 (2022) (describing how approximately three-quarters of Republicans and two-thirds of Democrats identify with their respective party out of dislike of the other party's policies just as much as they do because of the positive impact of their party's policies); *id.* at 15 (showing that the percentage of Republicans and Democrats who hold unfavorable views of the other party has more than doubled in the last two decades).

157 *See* Troiano, *supra* note 139, at 88–89.

158 *See* Pildes, Political Reforms, *supra* note 92.

did.[159] Taken together, these factors have created a Congress that is more polarized now than at any time since the Civil War.[160]

The price of prioritizing identity politics over policy to protect against primaries is steep. Fear of primaries alone explains "about one-quarter of the drop in bipartisan bill [co-sponsorship] since the 1980s."[161] Immigration, climate, education, healthcare, budgetary, and economic issues all pose challenges that the United States has failed to meaningfully address because of the polarization and gridlock caused by partisan primaries.[162]

In sum, voters who are unrepresentative of and ideologically extreme, compared to the general public, hold outsized influence in primaries. This skewed electorate incentivizes and rewards candidates to take more extreme positions and dissuades moderate candidates from even running. Once in office, out of well-founded fear of primary challenges from the ideologically extreme wings of their own party, elected officials act even more partisan and refrain from compromising with the other party. The result is legislative gridlock and ineffective governance, threatening the long-term health of democratic rule.

PROPOSED SOLUTIONS

Reforming the partisan primary system is possible.[163] The Task Force believes states should consider whether one, two, or all three of the following voting reforms would promote democracy in their particular circumstances: (1) open, non-partisan primaries; (2) rank-choice voting; and (3) fusion voting. Depending on the jurisdiction, these changes can be adopted through legislation or a ballot measure.

1. Open, non-partisan primaries in which all voters can participate

States should consider adopting open, nonpartisan primaries in which the entire electorate enjoys the right to vote. These are colloquially known as "open primaries" or "nonpartisan primaries," but the central feature is that any registered voter can cast a ballot, whether or not they are affiliated with a party. Then, states could allow the top two or four candidates who receive the most primary votes to advance to the general election regardless of their party affiliation, ensuring that voters have meaningful options across the ideological spectrum. At present, four states—Alaska, California, Nebraska, and Washington—have eliminated traditional party primaries and adopted some form of open primary for all or some elections.[164]

Among the four states that have eliminated partisan primaries altogether, only Alaska employs an open, top-four primary system in which the four candidates with the most votes advance to the general election

159 *See* Richard C. Barton, *Congress is Polarized. Fear of Being 'Primaried' is One Reason*, Wash. Post (June 10, 2022), https://www.washingtonpost.com/politics/2022/06/10/primaries-gridlock-polarization-congress-schrader-extremists/.

160 *See* Troiano, *supra* note 139, at 49.

161 *See* Barton, *supra* note 160.

162 *See* Troiano, *supra* note 139, at 101.

163 *See id.* at 56.

164 *See generally* Nat'l Conf. of State Legislatures, State Primary Election Systems (2024).

regardless of their party affiliation.[165] Alaska adopted this system in 2020, and it was first put to the test in the 2022 midterm cycle.[166] Utilizing this system, the 2022 election results revealed a voter preference for moderation over extremism. That year, Senator Lisa Murkowski, a moderate Republican who had repeatedly won reelection as one of Alaska's senators since 2002,[167] fended off a challenge from a more extreme candidate to her right, a contender that likely would have prevailed in a traditional partisan primary.[168] Under Alaska's new, top-four system, however, Murkowski made it to the general election, in which her broad appeal to independents and some Democrats enabled her to win by a significant margin.[169]

In 2024, a Democrat won the Alaska primary, followed by three Republican candidates. After two Republican candidates dropped out, Republican Nick Begich managed to defeat incumbent Democrat Mary Peltola 51.2% to 48.8%.[170] Alaska's general election is decided using a form of ranked-choice voting known as instant-runoff voting, in which the candidate who receives the fewest votes is eliminated and the votes that candidate received are reassigned to voters' second choice until a candidate receives majority support.[171] Thus, a candidate who does not initially receive majority support might ultimately win an election. Begich's election appears to reflect a strong consensus among Alaska voters.[172] If not for its open, nonpartisan system, there is reason to believe that Alaska might have elected a more extreme candidate.[173]

Alaska's open, top-four primary system thus appears to address some of the biggest problems associated with traditional partisan primaries. It created a field of candidates in the general election whose political views more closely mirrored those of the general

165 *See id.*

166 *See* Jeannette Lee & Jay Lee, *Alaska Primary Voters had More Choice in 2022*, Sightline Inst. (Nov. 4, 2022), https://www.sightline.org/2022/11/04/alaska-primary-voters-had-more-choice-in-2022/; Ryan Williamson, R St., *Evaluating the Effects of the Top-Four System in Alaska*, 122 R. St. Shorts 1, 1 (2023).

167 *See About*, U.S. Senator for Alaska Lisa Murkowski, https://www.murkowski.senate.gov/about-lisa (last visited June 5, 2024).

168 *See* Pildes, Political Reforms, *supra* note 92.

169 *See id.*; Nathan Atkinson et al., *Beyond the Spoiler Effect: Can Ranked-Chjoice Voting Solve the Problem of Polarization*, 2024 U. Ill. L. Rev. 1655, 1668–69 (2024) ("Murkowski therefore won the final round of the election with 136,330 votes to Tshibaka's 117,534, a margin nearing twenty thousand votes.").

170 *See Alaska Election Results*, N.Y. Times (last updated Dec. 10, 2024), https://www.nytimes.com/interactive/2024/11/05/us/elections/results-alaska.html; *Alaska At-Large Congressional District Primary Election Results*, N.Y. Times (last updated Sept. 3, 2024), https://www.nytimes.com/interactive/2024/08/20/us/elections/results-alaska-us-house-1-primary.html.

171 *See* Williamson, *supra* note 166, at 1.

172 *See* Deb Otis, *Alaska Election Results Show Ranked Choice Voting Continues to Work Well for Voters*, FairVote (Dec. 11, 2024), https://fairvote.org/alaska-election-results-show-ranked-choice-voting-continues-to-work-well-for-voters/.

173 *See generally* Iris Samuels, *In Alaska's U.S. House Race, GOP Support Is Split Between Two Trump-Aligned Candidates*, Anchorage Daily News (July 7, 2024), https://www.adn.com/politics/2024/07/07/in-alaskas-us-house-race-gop-support-is-split-between-two-trump-aligned-candidates/.

electorate.[174] It incentivized more candidates to run for office.[175] It made races more competitive.[176] And it allowed more candidates who were not affiliated with either of the two major parties to run for office.[177] Furthermore, voters in Alaska across all demographics seemed to easily understand how ranked-choice voting works,[178] and there were few invalid ballots due to voter error.[179] Crucially, Alaska's top-four system made a majority of voters feel as if their vote mattered more than it did in previous elections.[180]

For more than a decade, the states of California and Washington have used an open, nonpartisan top-two primary system in which the two candidates with the most votes advance to the general election regardless of their party affiliation.[181] Unsurprisingly, the effect of adopting a top-two primary system has been most pronounced for newly elected members of Congress. While there are conflicting studies on this, one study has found "those elected in top-two primaries are more than [eighteen] percentage points less extreme than closed primary legislators."[182]

Meanwhile, until recently Louisiana employed a variant of an open, nonpartisan top-two primary: if a candidate receives an outright majority of the vote in the primary, that candidate is elected; otherwise, there is a runoff election.[183] Results suggest that senators from states that have eliminated partisan primaries for federal elections are regarded as some of the most influential in the Senate, each having shepherded several pieces of bipartisan legislation in recent years.[184]

A more traditional alternative to an open, nonpartisan primary system is an open, partisan primary system in which voters may privately choose in which party primary they vote without having to register that choice with the party. Currently, sixteen states employ open partisan primaries, another seven states have open primaries only for unaffiliated voters, and five more states allow voters to choose in which primary they vote, but must do so publicly or by registering

174 *See* Lee & Lee, *supra* note 166.

175 *See id.*; Williamson, *supra* note 6, at 3–4.

176 *See* Williamson, *supra* note 6, at 3–4; *see* Lee & Lee, *supra* note 166 ("No statewide primary in 2022 had fewer than 10 candidates . . . meaning voters had more choice than before the election reforms took effect.").

177 *See* Lee & Lee, *supra* note 166.

178 *See* Troiano, *supra* note 139, at 186 ("[N]early 80% of Alaskans reported that ranking candidates in the general election was at least 'somewhat simple.' . . . These results were similar across demographics.").

179 *See id.* at 254 ("[D]uring Alaska's first year with RCV, 99.9% of ballots were cast without a problem, while 99.7% of voters cast valid ballots in New York City's rollout in 2021. These numbers only improve over time as voters gain familiarity.").

180 *See* McKinley Rsch., Alaska's Elections Reforms 3 (2023).

181 Nat'l Conf. of State Legislatures, *supra* note 164; Troiano, *supra* note 139, at 155–56.

182 *See* Christian R. Grose, *Reducing Legislative Polarization: Top-Two and Open Primaries Are Associated with More Moderate Legislators*, 1 J. of Pol. Insts. and Pol. Eco. 267, 273 (2020).

183 Nat'l Conf. of State Legislatures, *supra* note 164.

184 *See id.*

with the party.[185] In contrast, there are still seventeen states that hold closed or partially closed primaries, meaning that voters must be registered members of the party to vote unless a party elects to allow independent voters to participate.[186]

Switching from a closed to an open partisan primary system carries benefits. It appears to boost voter turnout.[187] It also seems to result in legislators being elected who "are [four] percentage points less extreme than legislators elected in closed primary systems" and who "are more ideologically moderate in their floor roll-call voting records."[188] But the evidence on the moderating effect of making primaries open without disturbing their partisan nature is mixed.[189] Moreover, opening partisan primaries "while retaining the rule that the plurality winner is elected, still enables the will of the majority to be defeated."[190]

Overall, compared to traditional and open, partisan primaries, an open, nonpartisan primary system appears to increase voter turnout[191] and result in more moderate candidates being elected[192] who also "wind up being more innovative and willing to strike legislative compromise."[193]

2. Ranked-choice voting

The Task Force also encourages states to consider whether their unique circumstances would benefit from employing some form of ranked choice voting in the general election to guarantee that those who are chosen to lead are backed by majority support and hold true democratic mandates to carry out the policies on which they were elected.

In ranked-choice voting, voters rank all the candidates on the general election ballot in the voters' preferred order, and the ballots are then tabulated in a way that majority support is eventually awarded to a candidate.[194] Ranked-choice voting thus ensures that the candidate elected enjoys majority support[195] while avoiding the cost, effort, and lower turnout

185 *See id.*

186 *See id.*

187 *See* Ferrer & Thorning, *supra* note 140, at 5.

188 *See* Grose, *supra* note 182, at 280–81.

189 *See* Pildes, Political Reforms, *supra* note 92.

190 *Cf.* Edward B. Foley, *Requiring Majority Winners for Congressional Elections*, 26 Lewis & Clark L. Rev. 365, 379 (2022) (discussing eliminating sore loser laws and prohibitions on write-in candidates).

191 *See* Joshua Ferrer, Michael Thorning & J.D. Rackey, The Effect of Open Primaries on Turnout and Representation 20–21 (Oct. 2024); Seth J. Hill, *Sidestepping Primary Reform*, 10 Pol. Sci. Rsch. & Methods 391, 398 (2022) (estimating that nonpartisan, top-two primaries result in 6.1 percent greater voter turnout).

192 *See* Grose, *supra* note 182, at 278 (finding that "the top-two primary is associated with legislators who are [at least] 7 percentage points more moderate than those legislators from closed systems").

193 *See* Arnold Schwarzenegger & Ro Khanna, *Don't Listen to the Establishment Critics. California's Open Primary Works.*, The Wash. Post (June 18, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/06/18/dont-listen-to-the-establishment-critics-californias-open-primary-works/; *accord* Grose, *supra* note 182, at 271.

194 *See generally* Atkinson et al., *supra* note 169, 1659–67 (discussing the various kinds of ranked-choice voting).

195 *See* Troiano, *supra* note 139, at 158.

associated with holding runoff elections.[196] Moreover, by incentivizing candidates to appeal to voters beyond their party's base to win second-choice or even third-choice votes, ranked-choice voting encourages civil discourse and increases campaign civility.[197]

Sixty-three jurisdictions across twenty-four states, including the entirety of Maine and Alaska, as well as New York City, San Francisco, Minneapolis, and Cambridge, Massachusetts, currently use a form of ranked choice voting.[198] Ranked-choice voting is also used by military and overseas voters in federal runoff elections in six states.[199] Voters in cities that use ranked-choice voting overwhelmingly support it, and ranked-choice voting is associated with lower rates of voter error than traditional, non-ranked-choice voting.[200] New research shows that ranked-choice voting increases representation, mobilization, and turnout.[201]

Nevertheless, as with adopting open, non-partisan primaries, ranked-choice voting is not a panacea for combating electoral extremism. Critics argue that ranked-choice voting is complicated and that many voters will still only rank one candidate.[202] But voter education campaigns have been successful in promoting engagement with ranked-choice voting.[203] To allow voters to express their preferences across a range of ideological choices, voters must first be given that range of ideological choices. This is why ranked-choice voting pairs well with open, nonpartisan primaries.

Open, nonpartisan primaries and ranked choice voting may enable elected officials to feel free to break on occasion from the partisan party line. For example, three of the Republican senators who voted to convict President Trump at his second impeachment trial came from states with either non-partisan primaries or ranked-choice voting. Similarly, Congressman Jared Golden of Maine was one of the few Democratic House members to vote against President Biden's

196 *See* FairVote, Research and Data on RCV, *supra* note 151; David C. Kimball & Joseph Anthony, Voter Participation with Ranked Choice Voting in the United States (Oct. 2016) (unpublished manuscript), https://www.umsl.edu/~kimballd/KimballRCV.pdf (finding that voter turnout was approximately nine or ten percentage points higher in localities that adopted ranked-choice voting than it was in control cities before); Pildes, Political Reforms, *supra* note 92; Jeremy Rose, FairVote, Primary Runoff Elections and Decline in Voter Turnout 2 (2022) (determining that turnout decline is nearly universal in runoff elections with a median decline in turnout of forty percent).

197 *See* FairVote, Research and Data on RCV, *supra* note 151.

198 *See Ranked Choice Voting Information*, FairVote, https://fairvote.org/our-reforms/ranked-choice-voting-information/#where-is-ranked-choice-voting-used (last visited June 4, 2025).

199 *See id*.

200 *See id*.

201 *See* Eveline Dowling & Caroline Tolbert, *What We Know About Ranked Choice Voting, Updated for 2025*, A.B.A. (Mar. 6, 2025), https://www.americanbar.org/groups/public_interest/election_law/american-democracy/our-work/what-we-know-about-ranked-choice-voting-2025/.

202 *See id*. *See also* Jerry H. Goldfeder, *Don't Lose Your Vote – Rank All 5!*, AmNYLaw (June 11, 2025), https://www.cozen.com/Templates/media/files/Don't%20Lose%20Your%20Vote%20-%20Rank%20All%205!_Goldfeder_amnylaw-june-11-digitaledition.pdf.

203 *See id*.

Build Back Better bill and in favor of Trump-era policies on immigration.

To date, the ABA has not supported ranked-choice voting. The Task Force recommends that the ABA further study[204] the various methods of ranked-choice voting and adopt the concept as ABA policy.

3. Fusion voting

A third method to combat hyper-partisan polarization and the gridlock in governance that such polarization produces is fusion voting. In general elections, fusion voting allows two or more parties to nominate the same candidate, with that candidate's consent.[205] Such candidates appear on the ballot under the banner of each legally recognized party. Votes are tallied separately by party and then added together to produce the final outcome.[206] Importantly, fusion voting eliminates the so-called "spoiler" or "wasted vote" dilemma that threatens to make third parties irrelevant or counterproductive. Instead, it allows voters to back a candidate with a feasible chance of winning, but to do so under a party banner that better reflects the voter's values. Fusion voting thus disrupts the restrictive two-party binary.

Fusion voting was common and uncontroversial until the end of the 19th century, when "anti-fusion" laws were adopted to inhibit cross-party collaboration.[207] At that time, anti-fusion laws were favored by white supremacists who sought to reduce the influence of minority voters.[208] Unfortunately, few states have lifted these laws, and the Supreme Court held they were constitutional.[209] The anti-fusion law in New Jersey is currently being challenged in litigation.[210] Only two

204 We note that the ABA Young Lawyers Division, in collaboration with the Standing Committee on Election Law and others, has conducted programming on ranked-choice voting and committed to considering the Working Paper presented by the Task Force, What We Know About Ranked Choice Voting, Updated for 2025 in order to find consensus among election-lawyers as to implementation of ranked-choice voting when adopted.

205 *See* Pildes, Political Reforms, *supra* note 92.

206 *See Fusion Voting*, Ballotpedia, https://ballotpedia.org/Fusion_voting (last visited June 4, 2025).

207 *See* Lee Drutman, Tabatha Abu El-Haj, & Beau Tremitiere, *Reviving the American Tradition of Fusion Voting*, A.B.A. (May 31, 2024), https://www.americanbar.org/groups/public_interest/election_law/american-democracy/our-work/reviving-american-tradition-fusion-voting/. For a longer history of fusion voting, see Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 Am. Hist. Rev. 287 (1980).

208 *See id.*

209 *See* Timmons v. Twin Cities Areas New Party, 520 U.S. 351 (1997). But voters have continued to challenge fusion voting, and later cases are in tension with *Timmons*. *See* Drutman et al., *supra* note 207; Pildes, Political Reforms, *supra* note 92. In Wisconsin, a group has challenged the state's anti-fusion law, arguing that it violates Wisconsinites' rights to freedom of speech and association and to "free government" guaranteed under the state constitution. *See* Sarah Lehr, *Wisconsin Once Allowed 'Fusion Voting.' A Lawsuit Aims to Bring It Back.*, Wis. Pub. Radio (Apr. 29, 2025), https://www.wpr.org/news/wisconsin-fusion-voting-lawsuit-bring-back.

210 *See* Br. for Historians as Amicus Curiae, In re Malinowski, No. A-003542-21 (N.J. Super. Ct. App. Div. July 10, 2023), https://protectdemocracy.org/wp-content/uploads/2022/07/Amicus-Brief-Historians-Argersinger-et-al.pdf.

states—New York and Connecticut—permit full fusion voting today.[211]

States should consider lifting their "anti-fusion" laws. Fusion voting allows for cross-partisan collaboration and permits voters to support minority parties without "wasting" their votes.[212] Given that over 40% of voters identify as independent, it is worth giving voters the opportunity to deviate from their registered party affiliation.[213] Fusion can also temper extremism, forcing candidates to appeal to a broader audience and face a fractured opposition. Organizations across the ideological spectrum have come out in support of fusion voting.[214]

In sum, the Task Force is convinced that the partisan primary system that currently predominates in the United States is a source of much of the partisan gridlock. But it is a problem that can be solved. And it is a problem that states are increasingly attempting to solve. While every voting system has advantages and disadvantages to weigh, this is not a reason to tolerate the status quo.

D. Reducing Partisan Influence in Election Administration

Confidence in the accuracy of U.S. elections remains low in some quarters.[215] In recent years, some Americans have come to believe that election officials conspire to skew election results in support of their preferred candidates.[216] Even after protestors stormed the United States Capitol on January 6, 2021, to stop the certification of electoral votes based on the false belief that the Democratic Party stole the 2020 election, that claim was repeated even after President Biden was inaugurated and during his tenure.[217] Given the persistence of the stolen election myth, faith in American elections was an issue, especially among certain Republican voters,

211 *See* Pildes, Political Reforms, *supra* note 92.

212 *See id.*

213 *See* Drutman et al., *supra* note 207.

214 *See id.*

215 *See, e.g.*, Pub. Affs.Council, *Few Americans Believe 2024 Elections Will Be 'Honest and Open'* (Oct. 2023), https://pac.org/impact/few-americans-believe-2024-elections-will-be-honest-and-open; World Just. Project, *The U.S. Now Ranks 43rd on Election Confidence* (Oct. 23, 2024), https://worldjusticeproject.org/news/us-now-ranks-43rd-election-confidence.

216 *See* Anthony Salvanto et al., *Americans See Politicized Election System in U.S.*, CBS News (Sept. 4, 2022), https://www.cbsnews.com/news/elections-democracy-opinion-poll-2022-09-04 (polling indicates that almost two thirds of Americans think that election procedures are being politicized and separately that at least some election officials may refuse to certify results).

217 Linley Sanders & Nicholas Riccardi, *Republicans' Trust in Accuracy of US Elections Jumps After Trump's Win, AP-NORC Poll Finds*, AP News (Jan. 3, 2025), https://apnews.com/article/voting-election-security-republicans-trump-ap-poll-6171a25bd64dbb47505b8c907ddcb037.

until President Trump's victory in 2024.[218] For their part, certain Democratic voters exhibited similar outcome-oriented reasoning in 2024, as their confidence in the outcome of the elections dipped—albeit much more slightly than Republicans' confidence increased—after President Trump won.[219] Notwithstanding skewed partisan perceptions, elections in the recent past—through and since the COVID-19 pandemic—have been conducted properly, with minimal and inconsequential incidents of errors or abuse. Indeed, 2020 was the most scrutinized and most secure election in American history.[220]

PROBLEM STATEMENT

Almost all election administration in this country is done at the state, county, or local level. Meanwhile, election laws and procedures vary widely from state to state, and often within states.[221] Election administration requires a permanent staff of civil servants, buttressed during election season by tens of thousands of temporary poll workers who handle ministerial tasks.[222] Every state has a senior official with overall responsibility for election administration, often the secretary of state; though the precise nature of the role varies, it generally includes maintaining state voter rolls and certifying election results.[223] The federal government plays no direct role in election administration, but the United States Election Assistance Commission provides technical support and guidance to local election authorities.[224]

Across the country, state election officials are selected through political processes. Each state's top election authority is either elected or directly appointed by someone who was elected.[225] At the local level, around 60% of election officials are themselves elected.[226] Even poll workers are sometimes picked from lists assembled by local party officials.[227] In the

218 *Id.* In October 2024, only two in ten registered Republicans were confident that the election would be conducted properly. Once the results came in, that number jumped to six in ten. *See id.*

219 *Id.*

220 The Ctr. for Election Innovation & Rsch., One Year Since January 6, at 1-2 (2021), https://electioninnovation.org/research/one-year-since-january-6/.

221 *See Election Administration at State and Local Levels*, Nat'l Conf. of State Legislatures (Dec. 12, 2023), https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels.

222 *See id.*; U.S. Election Assistance Comm'n, Poll Workers and Polling Places 2 (2017).

223 *See generally*, Election Reformers Network, The Powers and Duties of State-level Secretaries of State (2022).

224 *See About the EAC*, U.S. Election Assistance Comm'n, https://www.eac.gov/about (last visited July 14, 2025). The EAC is itself controversial, with its detractors arguing that it is irrelevant, ineffective, and covertly partisan. *See, e.g.*, Theo Mennen et al, Bipartisan Pol'y Ctr., The Nuanced Challenges of the U.S. Election Assistance Commission (2024).

225 In thirty-one states, a single elected official, typically the secretary of state, has primary responsibility. *See* Al Vanderklipp, *Which States Have Election Commissions or Boards*, Election Reformers Network (Apr. 29, 2021), https://www.electionreformers.org/articles/which-states-have-election-commissions-or-boards. In ten states, a board, typically selected by politicians, has responsibility, and in nine states an elected official shares responsibility with a board. *See id.*

226 *See* David C. Kimball & Martha Kropf, *The Street-Level Bureaucrats of Elections: Selection Methods for Local Election Officials*, 23 Rev. Pol'y Rsch. 1257, 1261 (2006).

227 *See* Grace Gordon & Rachel Orey, Bipartisan Pol'y Ctr., Fortifying Election Security Through Poll Worker Policy 2 (2022).

vast majority of states, there are few formal checks on the power of senior election officials to manipulate elections on behalf of favored candidates, including even themselves.[228] In all, this structure is highly unusual among democratic countries, where elections are typically run by constitutionally independent bodies.[229] Among peer democratic nations, the United States ranks near the very bottom in terms of perceived election integrity among election experts.[230]

Most alarmingly, as a result of the myth that the 2020 election was stolen, state and local election officials themselves are becoming overtly political. Since 2020, there has been a concerted push for certain highly partisan individuals to win election or appointment as election officials.[231] A number of election officials across the country denied the legitimacy of the 2020 presidential election and peddled the false claim that it was "stolen."[232] Some refused to certify valid election results after the 2022 midterm elections.[233] Certain state legislatures have considered laws that would further politicize election administration by giving the legislature a

228 *See* Ropes & Gray, Chief Election Officers and Conflicts of Interest 6 (2020) (only two states have any kind of conflict-of-interest laws for the secretary of state). In the words of former Connecticut Secretary of State Miles Rappoport, "[o]f course I played it straight, but I didn't have to." Kevin Johnson et al., Election Reformers Network, Guardrails for the Guardians 31 (2020).

229 *See* Grace Gordon et al., *The Dangers of Partisan Incentives for Election Officials*, Bipartisan Pol'y Ctr. (Apr. 6, 2022), https://bipartisanpolicy.org/report/the-dangers-of-partisan-incentives-for-election-officials.

230 *See* Holly Ann Garnett, Toby S. James & Sofia Caal-Lam, Electoral Integrity Project, Electoral Integrity Global Report 8-9 (2024); *see also* World Just. Project, *supra* note 215.

231 This is true of both major parties. *See* Isaac Arnsdorf, *Heeding Steve Bannon's Call, Election Deniers Organize to Seize Control of the GOP — and Reshape America's Elections*, ProPublica (Sept. 2, 2021), https://www.propublica.org/article/heeding-steve-bannons-call-election-deniers-organize-to-seize-control-of-the-gop-and-reshape-americas-elections (discussing a concerted effort to seize control of election machinery by running extreme right partisans to fill key election roles, from secretaries of state to county election clerks); Clay Masters, *Why Democrats See Opportunity in this Key State Office*, NPR (Nov. 3, 2018), https://www.npr.org/2018/11/03/662802539/why-democrats-see-opportunity-in-this-key-state-office (discussing efforts by state Democratic parties to seize control of secretary of state offices in key states).

232 *See Where Do Election Deniers Oversee Elections as Secretary of State?*, Election Reformers Network (Feb. 1, 2024), https://www.electionreformers.org/articles/where-do-election-deniers-oversee-elections-as-secretary-of-state; Brennan Ctr. for Just., *Election Denial in Races for Election Administration Positions*, https://www.brennancenter.org/series/election-denial-races-election-administration-positions (last visited May 29, 2025); Emma Brown, *An Elections Supervisor Embraced Conspiracy Theories. Officials Say She Has Become an Insider Threat*, Wash. Post (Sept. 26, 2021), https://www.washingtonpost.com/investigations/an-elections-supervisor-embraced-conspiracy-theories-officials-say-she-has-become-an-insider-threat/2021/09/26/ee60812e-1a17-11ec-a99a-5fea2b2da34b_story.html.

233 *See* Doug Bock Clark, *Some Election Officials Refused to Certify Results. Few Were Held Accountable*, ProPublica (Mar. 9, 2023), https://www.propublica.org/article/election-officials-refused-certify-results-few-held-accountable.

role in various key election functions like the certification of results.[234]

Election officials have variable levels of professionalism. Many senior-level election officials lack any formal training in election administration.[235] At lower levels, some officials may have certification or training provided by their state, the federal government, or non-governmental organizations, but training is not mandatory in all jurisdictions.[236] Although all states require some level of training for poll workers, the level and content of this training vary widely.[237]

Voters' confidence that the 2024 elections were conducted fairly and accurately varied by party affiliation. According to the Public Religion Research Institution, confidence in the 2024 election was much higher among Republican voters (66%) than among Democratic voters (44%).[238] 63% of Republican voters continue to believe that the 2020 election was stolen, a view that Democrats almost unanimously reject.[239] It therefore appears that confidence in the veracity of election results is tied, unfortunately, to satisfaction with those results.

PROPOSED SOLUTIONS

Some jurisdictions have professionalized election administration. One of the more promising models for state-level non-partisan election administration in the United States is Wisconsin's Government Accountability Board.[240] The Board—which was made up of retired judges who were not members of any political party or otherwise connected to partisan politics—had a track record of fairly and even-handedly resolving election disputes that would otherwise have been committed to elected or appointed political officials.[241] Unfortunately, the nonpartisan and highly praised Board was replaced in 2016 by a "stalemated and ineffective" Elections Commission, returning politics to Wisconsin's election administration.[242] At the local level, depoliticized election practices

234 *See* States United Democracy Ctr., A Democracy Crisis in the Making: 2024 Election Threats Emerging 12-22 (2023).

235 *See* Johnson et al., *supra* note 228, at 29–30 (since 2010, only about a third of secretaries of state had experience or knowledge relevant to election administration, with a significantly lower share of relevant experience among Republican secretaries).

236 *See Election Administration at State and Local Levels*, *supra* note 221 (noting that thirty-two states require training for LEOs).

237 *See generally* U.S. Election Assistance Comm'n, State-by-State Compendium – Election Worker Laws & Statutes (2023) (overview of laws governing election workers across the country); *see also Poll Worker Training*, Nat'l Conf. of State Legislatures (Dec. 4, 2023), https://www.ncsl.org/elections-and-campaigns/poll-worker-training (discussing challenges and variation in training within and between districts).

238 Pub. Religion Rsch. Inst., *Analyzing the 2024 Presidential Vote: PRRI's Post-Election Survey* (Dec. 13, 2024), https://www.prri.org/research/analyzing-the-2024-presidential-vote-prris-post-election-survey/.

239 *Id.*

240 *See* J. Mijin Cha & Liz Kennedy, Demos, Millions to the Polls – Practical Policies to Fulfill the Freedom to Vote for All Americans 43 (2014).

241 *See id.*

242 Vanessa Swales, *With All Eyes on Wisconsin, Partisan Gridlock at State Elections Commission Frustrates Voters and Local Officials*, ProPublica: Electionland (Oct. 26, 2020), https://www.propublica.org/article/with-all-eyes-on-wisconsin-

exist, but they vary. In states like Maine, New Hampshire, and Oregon, elections are run by a non-partisan elected clerk, while states like Virginia and New York use bipartisan boards appointed by local politicians.[243]

The Task Force endorses state-level reform measures to professionalize officials, offices, and commissions with responsibility for election administration. To the extent that a statewide elected office shares other important political responsibilities, as may be the case for the secretary of state, the role of the top state election official may be separated from the political roles of the office. Alternatively, the office of the secretary of state may itself be made a non-partisan position. If practicable, lower-level election officials should be made non-partisan, even if they remain elected. Such reforms are broadly popular with Americans regardless of political affiliation.[244] Although there are very few substantiated allegations of misconduct by election officials, the appearance of partisanship is troubling to many voters, so depoliticizing local election administration could go a long way towards improving public trust.[245]

The Task Force also recommends developing and requiring professional certifications and ethical standards for election officials and workers. While there are institutions that offer certification programs for election workers, as noted above, many states do not require any training for election officials, and none require certification.[246] No state imposes qualifications on its chief election officer. All states should require some level of training and, ideally, certification for election officials at all levels. Election integrity should not depend entirely on the personal ethics of election officials. A strong, enforceable code of professional responsibility would help curb potential abuses and provide much needed guidance to poll workers and other elections officials in the field.[247] Even the conduct of election workers engaged in purely ministerial tasks is important for maintaining trust in

partisan-gridlock-at-state-elections-commission-frustrates-voters-and-local-officials.

243 *See* Kimball & Kropf, *supra* note 226 at 1266–68.

244 *See* Charles Stewart III, MIT Election Data + Sci. Lab, How We Voted in 2020: A Topical Look at the Survey of the Performance of American Elections 32 (2021), https://electionlab.mit.edu/sites/default/files/ 2021-03/HowWeVotedIn2020-March2021.pdf.

245 *See* Miles Parks, *Partisan Election Officials Are "Inherently Unfair" But Probably Here To Stay*, NPR (Nov. 29, 2018), https://www.npr.org/2018/11/29/671524134/partisan-election-officials-are-inherently-unfair-but-probably-here-to-stay.

246 *See* Grace Klinefelter, William T. Adler, Rachel Orey, Bipartisan Pol'y Ctr., Training for Election Officials: A 50-State Analysis (2025). *See also Certified Elections Registration Administrator (CERA) Certification*, Election Ctr., https://electioncenter.org/certification/cera-individual-certification/ (last visited July 14, 2025); *Certificate in Election Administration*, U. Minn., https://www.hhh.umn.edu/certificate-programs/certificate-election-administration (last visited July 14, 2025).

247 The National Association of Secretaries of State has adopted and repeatedly affirmed a voluntary code of ethics. *See* Resolution Affirming the Conduct of Elections in a Nonpartisan Manner, Nat'l Ass'n of Sec'ys of State (Feb. 2, 2020), https://www.nass.org/node/114.

the fairness and integrity of elections. They, too, can and should be held to robust ethical standards.[248]

E. Increasing Election Worker Safety

Election workers are vital to the administration of fair and free elections.[249] They are responsible for the smooth functioning of elections nationwide, setting up voting equipment, processing eligible voters, and counting ballots. Today, election workers at all levels find themselves the targets for those seeking to undermine American democracy.[250] Not only do these attacks take a toll on the individual victims, but they also risk depleting the ranks of experienced officials pivotal to the effective administration of elections.[251]

PROBLEM STATEMENT

After the 2020 elections, election workers became the scapegoats for the election results and the target of harassment.[252] Experts consider the recent uptick in threats and doxing against election workers a byproduct of election deniers' false narratives.[253] Once obscure, election administrators have been catapulted into the center of politically-charged conspiracy theories.[254] For example, Former Philadelphia City Commissioner Al Schmidt testified in the January 6 Congressional Committee hearings that he and his family received graphic death threats following tweets about his refusal to impugn the 2020 election results.[255] Additionally,

248 *See, e.g.*, King v. Whitmer, 71 F.4th 511, 527 (6th Cir. 2023) (noting that "rank partisanship among election workers . . . undermines public confidence"). Wisconsin, for instance, requires poll workers to swear an oath to uphold and protect the Constitution before they can be hired. *See* Lauren Miller Karalunas, *Wisconsin Election Officials: Rules and Constraints*, Brennan Ctr. for Just. (Mar. 18, 2024), https://www.brennancenter.org/our-work/research-reports/wisconsin-election-officials-rules-and-constraints; *see also Poll Worker Training*, *supra* note 237 (some local election officials "reported concerns about the possibility of poll workers who could take some nefarious action 'from the inside.' One [official] requires poll workers to sign a code of conduct to help guard against these issues; it has been well received by poll workers in that jurisdiction.").

249 *See* Derek Tisler & Lawrence Norden, Brennan Ctr. for Just., Securing the 2024 Election 15 (2023), https://www.brennancenter.org/our-work/policy-solutions/securing-2024-election [hereinafter Tisler & Norden, Securing the 2024 Election].

250 *See* Ruby Edlin & Lawrence Norden, *Poll of Election Officials Shows High Turnover Amid Safety Threats and Political Interference*, Brennan Ctr. for Just. (Apr. 25, 2023), https://www.brennancenter.org/our-work/analysis-opinion/poll-election-officials-shows-high-turnover-amid-safety-threats-and.

251 *See* Jane C. Timm, *The DOJ Is Investigating Dozens of Threats against Election Workers*, NBC News (Mar. 25, 2024), https://www.nbcnews.com/politics/elections/doj-investigating-dozens-threats-election-workers-rcna145014.

252 *See* Tisler & Norden, Securing the 2024 Election, *supra* note 249, at 11.

253 *See* Cat Zakrzewski, *Election Workers Brace for a Torrent of Threats: "I KNOW WHERE YOU SLEEP,"* Wash. Post (Nov. 8, 2022), https://www.washingtonpost.com/technology/2022/11/08/election-workers-online-threats.

254 *See id.*

255 *See* 6abc Digital Staff & Annie McCormick, *Fmr. Philadelphia City Commissioner Describes 'Specific, Graphic' Threats Made after Trump Tweet*, ABC News (June 14, 2022), https://6abc.com/al-schmidt-testimony-philadelphia-

Georgia election workers Wandrea Shaye Moss and her mother, Ruby Freeman, became targets of sexual and racist attacks after they were featured in a video falsely claiming to show workers scanning fake ballots.[256] Charleston County's Executive Election Officer, Isaac Cramer, testified before the U.S. Senate that a local group traveled to election sites to harass poll managers during the June 2022 primaries.[257] These incidents illustrate challenges that election workers encounter daily.

In response to threats and doxing, in 2021, the U.S. Department of Justice launched the Election Threats Task Force to assess election workers' allegations of threats directed against them.[258] Stemming from these complaints, the Justice Department charged 20 people and secured over 15 convictions.[259] However, election officials and voting rights advocates have criticized the Election Threats Task Force for prosecuting what they perceive to be an insufficient number of cases given the scale of threats surrounding the 2020 election.[260] Many election workers report that the number of prosecutions and convictions represents only a fraction of the abuse and intimidation they have experienced.[261] It remains to be seen whether the Election Threats Task Force will continue operations in 2025 and beyond.[262]

The hostility that began in 2020 continued in the 2024 election. Election workers endured heightened public scrutiny, harassment, assault, and even stalking.[263] More than half of

city-commissioner-january-6-insurrection-capitol-attack/11955093.

256 *See* Joseph Marks & Aaron Schaffer, *Threats against Election Workers Could Have Bad Consequences*, Wash. Post (June 22, 2022), https://www.washingtonpost.com/politics/2022/06/22/threats-against-election-workers-could-have-bad-consequences.

257 *See Testimony of Mr. Isaac Cramer Before the S. Comm. on Rules & Admin.*, 118th Cong. (2024) (statement of Isaac Cramer, Exec. Dir., Charleston Cnty. Bd. of Voter Registration & Elections). One of the leaders threatened on social media that "[w]e have the enemy on their back foot, press the attack." *Id.*

258 *See* Memorandum for All Federal Prosecutors from Lisa Monaco, Deputy Att'y Gen., Guidance Regarding Threats against Election Workers (June 25, 2021), https://www.justice.gov/dag/file/1160226-0/dl?inline [hereinafter Memorandum for All Federal Prosecutors].

259 *See* Timm, *supra* note 251; Laura Romero & Peter Charalambous, *DOJ Task Force, Formed In 2021 to Fight Election Threats, Has Brought Only 20 Cases*, Abc News, (Sept. 5, 2024), https://abcnews.go.com/US/doj-task-force-formed-2021-fight-election-threats/story?id=113355654.

260 *See* Romero & Charalambous, *supra* note 259; Zakrzewski, *supra* note 253.

261 *See* Romero & Charalambous, *supra* note 259; Zakrzewski, *supra* note 253.

262 *See*, *e.g.*, Letter from Alex Padilla, U.S. Senator, et al. to Pam Bondi, U.S. Attorney General (Mar. 17, 2025), https://www.warner.senate.gov/public/_cache/files/6/b/6bbaf61a-866c-449e-bfeb-12d384bd5124/8ABE8D1454D4AEEA0B7BC4D7F8A01F726F7177A10641E2011BA1AAB718B24CE3.03.17.25-election-threats-task-force-letter-final.pdf.

263 *See* Billie Jean Shaw, *SLED Investigating After Fight Breaks Out at Orangeburg County Early Voting Location*, Wis 10 (Oct. 30, 2024), https://www.wistv.com/2024/10/31/authorities-investigating-after-fight-breaks-out-orangeburg-county-early-voting-location/; Kristin Dean & David Lynch, *BCSO: Voter Punches Poll Worker When Reminded Texas Law Requires Removal of MAGA Hat at Election Site*, Kens5 (Oct. 25, 2024), https://www.kens5.com/article/news/local/election-official-assaulted-at-early-voting-location-on-the-southwest-side-elections-officials-say/273-c95bac23-14f1-4427-8403-c403fd59a355; Amanda Engel, *Election Worker Followed Leaving a Polling Site in Carroll County*, WMAR-2

local election officials report being concerned about their colleagues' safety, and one in three election administrators report facing threats, harassment, and abuse.[264] In October 2024, the Justice Department unsealed a complaint against a Philadelphia man accused of threats to skin alive and kill a volunteer poll watcher recruiter. Police also arrested an Arizona man over shootings at a Democrat campaign office. A Florida man faced arrest after repeatedly threatening an election official. Another Arizonan set fire to a mailbox, damaging 20 ballots.[265] According to a survey from the Brennan Center for Justice, one in six election officials has experienced threats, and more than half of these cases have not been reported to law enforcement.[266]

As a result, there was a "tsunami" of election officials departing from their roles prior to the 2024 election.[267] The turnover was higher in 2022 than at any point over the past two decades.[268] More than one-third of local election officials knew at least one person who resigned in part due to safety concerns ahead of the 2024 election.[269]

The exodus of experienced election officials raises concerns about the smooth operation of elections and public confidence in the electoral process.[270] A high turnover rate means a loss of institutional knowledge, increasing the likelihood of errors and further undermining public confidence in the electoral process.[271] As newer, less experienced workers fill the gap, their heightened vulnerability to mistakes, combined with growing safety concerns, only deepens the instability. In all, election workers' increasing sense of insecurity no doubt undermines the effective administration of voting and confidence in the election outcomes. To maintain a functioning democracy, election workers must be able to administer elections free from improper partisan influences, threats of violence, and intimidating conduct.[272] Recent executive branch proposals to substantially reduce federal funding for the Cybersecurity and Infrastructure Security Agency (CISA), coupled with concerns that the Election Threats Task

(Oct. 31, 2024), https://www.wmar2news.com/news/national-politics/america-votes/election-worker-followed-leaving-a-polling-site-in-carroll-county.

264 Edlin & Norden, *supra* note 250.

265 Glenn Thrush, Adam Goldman, Alan Feuer & Eileen Sullivan, *Election Officials Face Torrent of Threats as Nov. 5 Looms*, N.Y.Times (Oct. 25, 2024), https://www.nytimes.com/2024/10/25/us/politics/election-officials-workers-threats.html.

266 *See* Brennan Ctr. for Just., Local Election Officials Survey 7 (2022), https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-march-2022.

267 Joshua Ferrer, Daniel M. Thompson, & Rachel Orey, *Election Official Turnover Rates From 2000-2024*, Bipartisan Pol'y Ctr. (Apr. 9, 2024), https://bipartisanpolicy.org/report/election-official-turnover-rates-from-2000-2024/.

268 *Id.*

269 Edlin & Norden, *supra* note 250.

270 *See* Ferrer, Thompson, & Orey, *supra* note 267.

271 *See* Grace Gordon et al., Bipartisan Pol'y Ctr., Deterring Threats to Election Workers 2 (2022), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/07/BPC_Deterring-Threats-to-Election-Workerks_R04.pdf [hereinafter Gordon et al., Deterring Threats].

272 *See* Memorandum for All Federal Prosecutors, *supra* note 258.

Force may be disbanded, threaten to exacerbate existing vulnerabilities and undermine public confidence in the integrity of U.S. elections.

There is no reason to assume this turmoil was limited to the 2020 and 2024 election cycles.

PROPOSED SOLUTIONS

Election worker safety remains a key concern following the 2024 election; thus, continued efforts are necessary. The Task Force recognizes existing ABA policy and advocacy regarding election worker safety,[273] and endorses the following three additional measures to strengthen election worker safety:

1. Federal funding

A substantial investment is necessary for the administration of safe elections. Prior to the 2024 election, the Brennan Center estimated that approximately $300 million was necessary to guarantee that election workers are physically secure.[274] In calculating these costs, the Brennan Center recommended four key measures to bolster election workers' safety: bullet-proofing windows and doors of election offices, installing panic alarm systems, implementing key card access restrictions and video surveillance, and providing personal information protection.[275] Given the number of armed protests held outside of election offices in Arizona, Michigan, Nevada, and Pennsylvania, some local officials upgraded their offices' security with bulletproof designs in anticipation of the 2024 elections.[276] Some offices also allowed staff access to restricted entrances to polling locations, where members of the public cannot confront them.[277]

To enable states to update the physical safety features of election sites, in 2023, the Department of Homeland Security announced a change in its Homeland Security Grant Program. This change required states to dedicate at least 3% of the money they receive to election security.[278]

Overall, the reduced severity of threats to election workers following the 2024 general election may reflect the impact of increased federal investment and enhanced protective measures; alternatively, it may correlate with the outcome of the election itself. Regardless of causation, the Task Force recommends sustained and increased federal funding to support election security initiatives and

273 *See Safeguarding Elections: Decades of ABA advocacy has helped ensure access to the ballot box*, ABA Journal (Aug. 1, 2024), https://www.abajournal.com/magazine/article/safeguarding-elections-decades-of-aba-advocacy-has-helped-ensure-access-to-the-ballot-box.

274 *See* Derek Tisler & Lawrence Norden, *Estimated Costs for Protecting Election Workers from Threats of Physical Violence*, Brennan Ctr. for Just. (May 3, 2022), https://www.brennancenter.org/our-work/research-reports/estimated-costs-protecting-election-workers-threats-physical-violence [hereinafter Tisler & Norden, Estimated Costs].

275 *See id.*

276 For example, an election administrator in Chaffee County, Colorado installed bullet-resistant barriers in her office to keep her staff safe. *See id.*

277 *See* Tisler & Norden, Estimated Costs, *supra* note 274.

278 *See* Press Release, U.S. Dep't of Homeland Sec., DHS Announces $2 Billion in Preparedness Grants (Feb. 27, 2023), https://www.dhs.gov/news/2023/02/27/dhs-announces-2-billion-preparedness-grants.

strongly opposes any efforts to reduce resources—particularly for agencies such as CISA, which plays a critical role in safeguarding election infrastructure at all levels.

2. Expanding legal protections

Thirty-five states and Washington, D.C., have laws addressing protections for election administrators, ten of which were enacted since 2020.[279] The Task Force endorses state legislatures' recent and continued efforts to increase election workers' legal protections. These safeguards are essential to protect election workers both in their official capacities and when facing threats outside their places of work, which is an increasing reality for these officials.

How each state protects its election officials and poll workers varies. Thirty-four states have criminalized general intimidation and interference with election officials.[280] In April 2022, Maine passed An Act to Make Interfering with an Election Official a Class C Crime, which raised penalties for a person who intentionally interferes with a public official performing official election functions through force, violence, or intimidation.[281] While this law is a necessary step toward securing election worker safety, Maine's law fails to encapsulate the entire scope of threatening conduct directed at election workers, including doxing. Election workers serve a wider variety of roles for a longer period since voting options have expanded post-COVID-19.[282] Threats against election officials are no longer constrained to Election Day but rather extend before, during, and after.

Legislation in multiple states, including Arizona, Colorado, Maryland, Minnesota, Montana, and Oregon, extends Maine's approach to protect election officials beyond their official duties.[283] Arizona passed SB-1061 in 2023, which addresses doxing and allows public officials to remove their personal information from the public record if they believe that their life or safety is endangered.[284] Similarly, Colorado passed the Election Official Protection Act in June 2020, which increases protections for full- and part-time election officials alike.[285] The Colorado law prohibits threatening and intimidating election workers and also bars the release of personal information about election officials and their families to curb potential doxing. The aforementioned states' legislative efforts recognize critical lacunas of protection for election workers. We recommend that other states adopt approaches similar to these laws to ensure that legal protections cover threats against full- and part-time workers and those issued outside polling sites. Further, state

279 *State Laws Providing Protection for Election Officials and Staff,* Nat'l Conf. of State Legislatures (Jan. 13, 2025), https://www.ncsl.org/elections-and-campaigns/state-laws-providing-protection-for-election-officials-and-staff.

280 *Id.*

281 *See* 2021 Me. Laws 1. Specifically, this falls under Me. Rev. Stat. Ann. tit. 21-A, § 674 (2023).

282 *See* Tisler & Norden, Securing the 2024 Election, *supra* note 249, at 15.

283 *See* S.B. 1061, 56th Leg., 1st Reg. Sess. (Ariz. 2023); H.B. 22-1273, 2022 Gen. Assemb., Reg. Sess. (Colo. 2022); H.B. 585, 2024 Gen. Assemb., Reg. Sess. (Md. 2024); H.File 3, 93rd Leg., Reg. Sess. (Minn. 2023); S.B. 61, 68th Leg., Reg. Sess. (Mont. 2025); H.B. 4144, 81st Leg., Reg. Sess. (Or. 2022).

284 *See* Ariz. S.B. 1061.

285 *See* Colo. H.B. 22-1273.

legislatures should provide pathways for civil relief against persons who dox or make illegal threats, such as offering a restraining order.[286]

3. Guidance to local law enforcement

The Task Force also endorses the U.S. Department of Justice's Election Crimes Task Force's efforts to provide further guidance to local law enforcement on how to improve systems for investigating improper conduct.[287] Launching the Election Crimes Task Force was a major step in combating intimidation, but many still criticize the Justice Department's response as inadequate. A number of perpetrators have successfully avoided prosecution.[288] Some election officials have also felt discouraged when investigators appear not to have taken their allegations seriously or fail to follow up.[289] Law enforcement has attributed enforcement issues to challenges in locating anonymous harassers.[290] Nevertheless, federal, state, and local law enforcement must close the accountability gaps by enforcing anti-intimidation laws and thoroughly investigating allegations.

To facilitate implementation of these recommendations, the Task Force endorses continued support for the Department of Justice's Election Crimes Task Force—particularly given recent efforts to dismantle other election integrity initiatives.

4. Pro Bono Assistance

Under the leadership of long-time election lawyers Ben Ginsburg and Robert Bauer, an effort was launched to provide free legal assistance to election workers under threat or who were improperly or improvidently charged with civil offenses or crimes. This is a worthy model for others to emulate.

F. Increasing Access to Voting

The United States lags behind other democratic nations in overall voter participation.[291]

The story of voting rights in this country has been one of slow expansion in the face of unrelenting opposition. The U.S. Constitution originally delegated authority to make decisions about who was qualified to vote to

286 *See* Tisler & Norden, Securing the 2024 Election, *supra* note 249, at 15. The Brennan Center recommends that states model a civil provision based on the Voting Rights Act, which creates a private right of action to sue for an injunction, restraining order, or equitable relief. *See id.*

287 *See* Gordon et al., Deterring Threats, *supra* note 271, at 5–6.

288 *See* Linda So & Jason Szep, *Terrorized U.S. Election Workers Get Little Help From Law Enforcement*, Reuters (Sept. 8, 2021), https://www.reuters.com/legal/government/terrorized-us-election-workers-get-little-help-law-enforcement-2021-09-08.

289 *See id.*

290 *See id.*

291 *See* Drew Desilver, *Turnout in U.S. Has Soared in Recent Elections but by Some Measures Still Trails That of Many Other Countries*, Pew Rsch. Ctr. (Nov. 1, 2022), https://www.pewresearch.org/short-reads/2022/11/01/turnout-in-u-s-has-soared-in-recent-elections-but-by-some-measures-still-trails-that-of-many-other-countries. While turnout for the 2024 presidential election was the second-highest in U.S. history, it was still well below that of other democratic nations. *Compare Election Results, 2024: Analysis of Voter Turnout in the 2024 General Election*,

the individual states. During the Founding Era, most state legislatures restricted voting rights to white male property owners. It was not until after the Civil War that the Fifteenth Amendment officially prohibited voter disenfranchisement on the basis of race.[292] Women did not secure the right to vote until ratification of the Nineteenth Amendment in 1920. Even then, many states instituted policies, including literacy tests, poll taxes, and English-language requirements.[293] These egregious methods of voter suppression were met with protests from civil rights activists who called upon the federal government to ensure equal voting rights for all. In 1965, Congress heeded the call and passed the Voting Rights Act[294] with bipartisan support.[295] Among other things, the Act reaffirmed the right to vote regardless of race by barring many of the practices states had been employing to limit certain populations from voting.[296]

Despite this progress, barriers to voting—from onerous voter registration requirements to voter identification laws—continue to hinder full democratic participation.

PROBLEM STATEMENT

The ease with which citizens can access the voting process varies from state to state. In all states except North Dakota, voters must be registered before they can cast a ballot.[297] However, different states have different requirements regarding when, where, and how a person may complete their registration. Some states allow eligible citizens to register to vote at their local DMV[298] or at third-party registration drives.[299] Other states offer same-day voter registration, and a small number of states have automatic voter registration laws, under which residents are automatically registered to vote when they interact with certain state agencies.[300] The lack of uniformity across and within states regarding voter registration policies can cause confusion about registration deadlines, particularly for individuals who have recently relocated from a state with different registration requirements. Other people may incorrectly assume they

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Ballotpedia, https://ballotpedia.org/Election_results,_2024:_Analysis_of_voter_turnout_in_the_2024_general_election (lasted visited June 4, 2025) (noting turnout was 66.6% in the 2024 presidential elections) *with* Desilver, *supra* (noting Sweden had 84.2% turnout in 2022).

292 *See* U.S. Const. amend. XV.

293 *See Voting Rights: A Short History*, Carnegie Corp. of N.Y. (Nov. 18, 2019), https://www.carnegie.org/our-work/article/voting-rights-timeline.

294 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702 (1982).

295 *Voting Rights: A Short History*, *supra* note 293.

296 *See Voting Rights Act of 1965*, NAACP, https://naacp.org/find-resources/history-explained/legislative-milestones/voting-rights-act-1965 (last visited July 15, 2025).

297 *See* Jacob Carrel, *Legal Services Centers as Voter Registration Centers: A Stop-Gap Solution to Support Clients' Civic Engagement*, 78 Nat'l Laws. Guild Rev. 58, 60 (2022).

298 *Id.*

299 *See Restrictions on 3rd Party Voter Registration Drives*, Movement Advancement Project (Apr. 2, 2024), https://www.lgbtmap.org/democracy-maps/third_party_voter_registration_drives.

300 Carrel, *supra* note 297, at 61.

are registered to vote and fail to discover that they have been removed from the official list of registered voters until after their state's registration deadline has passed.[301]

Even when registration requirements are followed, there are several other factors that can make it difficult to vote. According to the U.S. Census Bureau, 73.6% of people eligible to vote successfully registered to vote, but only 65.3% actually cast a ballot.[302] Explanations for this disparity include the inability to spend time away from work or other responsibilities to vote;[303] a lack of physical polling locations near a person's home;[304] long lines at polling locations deterring those who would otherwise vote in person;[305] voter identification requirements imposed by some states;[306] and lack of equipment and training needed to assist individuals with disabilities, those who do not speak English as their primary language, and other voters who require additional support.[307]

Once a ballot is cast and submitted to state election administrators, it faces scrutiny before it can be counted. Ballots may be rejected for a number of reasons that vary by state. Common reasons include missing signatures, a mismatch between the signature on the ballot and the one on record, missing affidavit information, unnotarized ballots, or unsigned carrier envelopes.[308] Each state has different procedures for notifying voters about deficient ballots and offering a "cure" period. In some states, like Oklahoma, there is no opportunity to correct a rejected ballot—it is simply not counted.[309]

When citizens participate in our democracy by voting, they are more likely to feel represented by their government, have faith

301 *See* Nat'l Ass'n of Sec'ys of State, NASS Report: Maintenance of State Voter Registration Lists 7 (2017), https://www.nass.org/node/1266.

302 Press Release, U.S. Census Bureau, 2024 Presidential Election Voting and Registration Tables Now Available (Apr. 30, 2025), https://www.census.gov/newsroom/press-releases/2025/2024-presidential-election-voting-registration-tables.html.

303 *See* Jacey Fortin, *Why Only Some Workers Get Time Off to Vote on Election Day*, N.Y. Times (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/us/politics/election-day-holiday.html.

304 *See* Voting Rts. Lab, Polling Place Consolidation Negatively Impacts on Turnout and Equity 4 (2020), https://votingrightslab.org/2020/07/15/polling-place-consolidation-negative-impacts-on-turnout-and-equity.

305 *Id.* at 3.

306 *See generally* Movement Advancement Project, The ID Divide: How Barriers to ID Impact Different Communities and Affect Us All (2022), https://www.mapresearch.org/file/MAP-Identity-Documents-report-2022.pdf [hereinafter Movement Advancement Project, The ID Divide]

307 *See generally* Ctr. for Am. Progress, Enhancing Accessibility in U.S. Elections (2021), https://www.americanprogress.org/article/enhancing-accessibility-u-s-elections.

308 *See Ballot Curing Rules*, VoteAmerica, https://www.voteamerica.com/ballot-curing (last updated Oct. 21, 2024).

309 *Id.*

in the electoral process, trust the outcome of elections, and vote in future elections.[310]

PROPOSED SOLUTIONS

The Task Force notes that the ABA has in the past supported improved access to voting,[311] and encourages further efforts in this area. The Task Force recommends that states consider automatic voter registration, same-day voting, and early voting. The Task Force also advises that states maintain their voter registration lists, repeal their voter identification laws, and take a cautious approach to curing ballot errors. Finally, the Task Force notes that Congress may wish to consider making Election Day a federal holiday.

1. Automatic voter registration

States can expand the pool of registered voters by adopting automatic voter registration. Compared to other developed countries, the United States has a relatively high level of registered voter turnout.[312] However, the rate at which eligible voters register lags behind other countries. In 2024, less than 70% of all eligible adults were registered to vote, compared to approximately 90% in Australia and Germany.[313] In a majority of American states, individuals must affirmatively indicate their desire to register to vote.[314] Automatic voter registration converts the traditional opt-in voter registration process into one in which individuals must opt-out if they wish to decline registration. Automatic voter registration increases overall registration rates, especially among demographic groups currently underrepresented in voter registration lists.[315] It eliminates confusion about registration deadlines and incorporates the registration process into a routine transaction. And it makes it easier for states to maintain accurate voter rolls, minimizing the need to use provisional ballots that can be costly to process.[316] As of 2024, twenty-five states and the District of Columbia have implemented some form of automatic voter registration.[317] Eight of these states and the District of Columbia provide automatic voter registration exclusively through their DMVs; sixteen provide automatic voter registration through additional state agencies; and Alaska conducts automatic voter registration with its Permanent Fund Dividend Program.[318]

310 *See* Robert A. Kelly, *Improving Participation in the Democratic Process* 1 (A.B.A. Task for Am. Democracy, Working Paper No 6, 2024).

311 *See* ABA Election Administration Guidelines and Commentary, adopted by the House of Delegates as ABA policy, most recently at the 2023 Annual Meeting, Resolution 607; Jack Young & Jason Kaune, A.B.A., Improving Access to Voting 6 (May 6, 2024), https://www.americanbar.org/groups/public_interest/election_law/american-democracy/our-work/improving-access-to-voting/..

312 *See* Aaron Mendelson, *What Voter Turnout Shows, and Hides, About Elections* (Nov. 18, 2022), https://publicintegrity.org/politics/what-voter-turnout-shows-and-hides-about-elections.

313 *See supra* note 291.

314 *See Automatic Voter Registration*, Nat'l Conf. of State Legislatures, https://www.ncsl.org/elections-and-campaigns/automatic-voter-registration (last updated Sept. 24, 2024).

315 Eckman, *supra* note 81, at 22.

316 *See* Nat'l Conf. of State Legislatures, *supra* note 314.

317 *See id.*

318 U.S. Census Bureau, *supra* note 302.

2. Same-day voting

States could also remove barriers to same-day voter registration. As the name suggests, same-day registration allows qualified individuals to register to vote on Election Day.[319] Same-day voter registration allows a greater number of eligible people to vote because it removes the possibility that a person who misses a registration deadline will be barred from voting. It also helps ensure that individuals can still vote if they discover an error in their registration materials or if there is a system-wide issue with a voter registration database. As of 2024, twenty-three states and the District of Columbia currently offer same-day voter registration; twenty of those states offer same-day registration on Election Day, while one state only offers same-day registration during the early voting period.[320] Opponents of same-day voter registration have raised concerns that it imposes higher administrative costs and may actually deter voting by flooding election offices with last-minute registration requests that require expedited processing.[321] These concerns can be ameliorated by providing automatic voter registration in conjunction with same-day voter registration and reforming strict voter identification laws, as will be discussed further.

3. Early voting

In 2024, 30.7% of all American voters voted early, and 29% cast ballots by mail.[322] The COVID-19 pandemic and the consolidation of many physical polling locations have contributed to these high numbers and made these alternative voting methods commonplace. Early/mail-in voting is used at particularly high rates by voters with disabilities.[323] Despite the popularity of these voting methods, there is currently a patchwork of policies in place governing when and how voters can take full advantage of early/mail-in voting opportunities. Early voting periods range from three to forty-six days, and states have different requirements when it comes to who qualifies for an absentee ballot.[324] The Task Force recommends that states standardize deadlines and procedures. Prior to and during the early voting period, districts should notify voters about polling hours, locations, and accessibility.[325] Additionally, states should extend their early voting periods to maximize in-person voter turnout and allow for earlier

319 *See* Eckman, supra note 81, at 23.

320 *See Same-Day Voter Registration*, Nat'l Conf. of State Legislatures, https://www.ncsl.org/elections-and-campaigns/same-day-voter-registration (last updated Oct. 25, 2024).

321 *Id.* at 24.

322 Jacob Fabina, *Voter Registration in 2022 Highest in 20 Years for Congressional Elections*, U.S. Census Bureau (May 2, 2023), https://www.census.gov/library/stories/2023/05/high-registration-and-early-voting-in-2022-midterm-elections.html.

323 *See* Hazel Millard & Derek Tisler, Brennan Ctr. For Just., How to Make Early Voting More Accessible in New York (2023), https://www.brennancenter.org/our-work/research-reports/how-make-early-voting-more-accessible-new-york.

324 *See Early In-Person Voting*, Nat'l Conf. of State Legislatures (Mar. 12, 2024), https://www.ncsl.org/ elections-and-campaigns/early-in-person-voting; Nat'l Conf. of State Legislatures, Voting Outside of the Polling Place: Absentee, All Mail, and Other Voting at Home Options (2024).

325 Young & Kaune, supra note 311, at 6.

correction of registration errors and issues with voting devices.[326]

4. Maintain voter registration lists

State and local election officials can take steps to ensure that voter registration lists are regularly maintained, and individuals can easily check their voter registration status. The Help America Vote Act of 2002, or "HAVA"[327] requires all states to have "a single, uniform, centralized, interactive and computerized statewide voter registration list defined, maintained, and administered at the state level."[328] HAVA significantly improved the registration process by consolidating voter lists that were previously only maintained by local election offices. Regular list maintenance strengthens the integrity of elections by determining and preventing voter fraud.[329] Under the National Voter Registration Act of 1993,[330] states must make a reasonable effort to remove the names of people who are no longer eligible to vote from registration lists.[331] Beyond the minimum guidelines established by the NVRA, states have different criteria for when individuals can be "purged" from voter registration lists.

Several states have laws that allow for removal based on inactivity in subsequent elections and a failure to respond to an address confirmation mailing.[332] Unfortunately, these mailed notices have been proven overwhelmingly ineffective at informing voters of their imminent removal.[333] As such, these policies result in the improper or inadvertent de-registration of hundreds of thousands of voters each year.[334] To combat this problem, states should enhance the process for notifying voters of their removal from the state's voter registration list. At a minimum, states should notify voters via email as well as by mail if they are moved to an inactive status.[335] The notice should provide more information than is currently required by the NVRA about why a voter is being removed from the registration list and how they can either reactivate their registration or request a transfer of address. The notification

326 *See Expand Early Voting*, Brennan Ctr. For Just. (Feb. 4, 2016), https://www.brennancenter.org/our-work/research-reports/expand-early-voting.

327 Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 52 U.S.C.).

328 Nat'l Acad. Press, Improving State Voter Registration Databases: Final Report 5 (2010), https://nap.nationalacademies.org/read/12788/chapter/3.

329 *See id.*

330 52 U.S.C. §§ 20501–20511.

331 *See* Nat'l Conf. of State Legislatures, Voter Registration List Maintenance (2023), https://www.ncsl.org/elections-and-campaigns/voter-registration-list-maintenance.

332 *Voter Roll Purges Based Solely on Infrequent Voting*, Movement Advancement Project (Apr. 2, 2024), https://www.lgbtmap.org/img/maps/citations-voter-roll-purges.pdf.

333 Paul M. Smith, *"Use It or Lose It": The Problem of Purges from the Registration Rolls of Voters Who Don't Vote Regularly*, A.B.A.: Hum. Rts. Mag. (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/-use-it-or-lose-it---the-problem-of-purges-from-the-registration0.

334 *Voter Roll Purges Based Solely on Infrequent Voting*, *supra* note 332. States have also erroneously purged voters because state officials suspected they were noncitizens. Jude Joffe-Block, NPR (Oct. 30, 2024), https://www.npr.org/2024/10/29/nx-s1-5169204/virginia-noncitizen-voter-purge.

335 *See* Young & Kaune, supra note 311, at 4.

should also provide information about the exact process that is required to register in a new jurisdiction.[336]

5. Permit a variety of forms of voter identification

Voters who wait in line at their polling location are sometimes turned away for noncompliance with a state's voter identification laws. Thirty-six states require voters to show some form of identification at the polls.[337] Many of these states require voters to present an identification document that has a photo, such as a driver's license, state-issued identification card, military identification, or tribal identification.[338] Other states with less strict identification requirements allow voters to present alternative documents like utility bills, bank statements, government checks, and paychecks,[339] or sign a declaration of identity attesting to voter identity.[340] While strict voter identification laws are justified on the grounds that they safeguard against people fraudulently casting ballots under a different name, there is little evidence to suggest that they are particularly effective at deterring in-person fraud.[341] One study found that from 2000 to 2012, there were only thirty-one credible allegations of voter impersonation that stricter voter identification laws could have prevented.[342] Further, studies indicate that strict voter identification laws disproportionately impact certain communities, including people of color, people with disabilities, low-income voters, and students.[343] These groups face unique obstacles that make it more difficult to obtain a valid photo identification document. As of 2022, only 79% of Black adults and 77% of Hispanic adults nationwide had a valid driver's license.[344] Among transgender adults, only 32% have a valid driver's license that reflects their correct gender markers.[345]

Moreover, even when a person possesses a photo identification document, only certain forms of identification are accepted at the polls. For example, Texas allows handgun licenses for voting, but does not accept student identification cards.[346] North Carolina does not accept public assistance and state employee identification cards, which Black voters more commonly hold.[347] To reduce

336 *See id.*

337 Nat'l Conf. of State Legislatures, Voter ID Laws, https://www.ncsl.org/elections-and-campaigns/voter-id (last updated June 2, 2025) [hereinafter Nat'l Conf. of State Legislatures, Voter ID Laws].

338 *Id.*

339 *Id.*

340 Young & Kaune, *supra* note 311, at 3.

341 *Fact Sheet on Voter ID Laws*, ACLU (Aug. 2021), https://www.aclu.org/documents/oppose-voter-id-legislation-fact-sheet.

342 *Id.*

343 *Voter ID: Overview*, Brennan Ctr. For Just., https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/voter-id (last visited July 21, 2025).

344 *See* Movement Advancement Project, The ID Divide, *supra* note 306, at 10 (providing examples of systemic and historical barriers to obtaining identification documents).

345 *Id.* at 20.

346 See Nat'l Conf. of State Legislatures, Voter ID Laws, *supra* note 337.

347 *Fact Sheet on Voter ID Laws*, *supra* note 341.

the discriminatory effect of strict voter identification laws and increase voter turnout, states should enact policies that would allow voters to use more forms of identification documents to vote. Additionally, states should make it easier for individuals to obtain or renew valid identification documents by reducing the cost to get an identification document and simplifying the state-specific procedures that individuals must follow to do so.[348] A few states have already undertaken efforts to make the process more accessible. Michigan, for example, has installed over 160 self-service stations across the state that allow people to renew their identification documents and register to vote.[349] Virginia has established a program called DMV Connect that brings identification document services to people who may not otherwise be able to travel to a DMV.[350] Other states should follow suit and expand access to identification document services to all eligible individuals.

6. Curing ballot errors

The Task Force recommends that states improve processes for curing ballot errors. Currently, only thirty-three states have laws that require election officials to contact voters to inform them of an error with their ballot.[351] States also have different criteria for determining which types of ballot errors are curable. In some states, both ballots that have a mismatching signature and those with a missing signature can be corrected. In other states, only ballots with a mismatching signature can be fixed. For other types of errors, local election officials are often forced to decide for themselves how to apply ballot curing requirements with little guidance from the state.[352] States should develop comprehensive guidelines for local election offices to follow when evaluating ballots for errors. These guidelines should specify which types of ballot errors are able to be corrected and should provide a detailed procedure for correcting each type of error that election administrators and voters can follow, as well as a timeline for doing so. Additionally, states should require election officials to notify voters upon discovering an error with their ballot and explain to them exactly how they can correct the deficiency. Clarifying the ballot curing process will hopefully reduce the number of ballots that are unnecessarily rejected during an election.

7. Federal holiday

Finally, Congress should renew legislation similar to the Election Day Holiday Act,[353] introduced by Representative Anna G. Eshoo (D-CA) in the 118th Congress in February 2024.[354] The Act would remove job-related impediments to voting for public-sector employees. On the state level, the nineteen

348 *See* Movement Advancement Project, The ID Divide, *supra* note 306, at 24.

349 *Id*. at 25.

350 *Id*.

351 *Table 15: States with Signature Cure Processes*, Nat'l Conf. of State Legislatures, https://www.ncsl.org/elections-and-campaigns/table-15-states-with-signature-cure-processes (last updated Jan. 6, 2025).

352 Rachel Orey & Owen Bacskai, *The Low Down on Ballot Curing*, Bipartisan Pol'y Ctr. (Nov. 4, 2020), https://bipartisanpolicy.org/blog/the-low-down-on-ballot-curing.

353 H.R. 7329, 118th Cong. (2024).

354 *See id*.

states that have not already done so[355] should consider passing laws to either make Election Day a state holiday or require employers to provide paid time off for voting.

G. Role of the Press and Social Media in Promoting our Democracy

A free and fair election depends in large part on the public's access to reliable news sources to make informed political choices. Today, the rise of alternative news sources and the influx of generative artificial intelligence have greatly complicated the media coverage of our democracy in action.[356]

PROBLEM STATEMENT

The good news is that experts believe that social media has had a positive effect on civic engagement, registration, and early voting.[357] Social media platforms encourage election participation on their channels, provide links to voter registration portals, and promote ways to submit ballots. They also provide instantaneous political content; create spaces for new voices to be heard; and offer a diversity of content, from short digestible videos to accessible blogs.[358]

The bad news is that social media platforms far too often amplify false and misleading information in political discourse.[359] Direct, user-upload platforms also do not employ the same rigorous verification process that established news outlets do.

AI-generated content compounds the problem.[360] The explosion of generative-AI and deepfakes has contributed to the proliferation of "disinformation," or false information deliberately spread to deceive.[361] Deepfakes are artificial videos, images, audio, and text generated from a machine learning system that digitally and convincingly alter a person's image, voice, or words.[362]

355 *See Election Day Holiday and Paid Time Off to Vote*, Movement Advancement Project (Apr. 9, 2024), https://www.lgbtmap.org/img/maps/citations-election-day-holiday-paid-time-off-to-vote.pdf.

356 *See* Diana Owen, The New Media's Role in Politics, BBVA Open Mind (2018), https://www.bbvaopenmind.com/en/articles/the-new-media-s-role-in-politics.

357 *See* Magdalena Saldaña et al., *Social Media as a Public Space for Politics: Cross-National Comparison of News Consumption and Participatory Behaviors in the United States and the United Kingdom*, 9 Int'l J. Commc'n 3304, 3309–11 (2015).

358 *See id.*

359 *See generally* Erik C. Nisbet et al., *The Presumed Influence of Election Misinformation on Others Reduces Our Own Satisfaction with Democracy*, 1 Harv. Kennedy Sch. Misinfo. Rev. 1 (Mar. 12, 2021), https://misinforeview.hks.harvard.edu/article/the-presumed-influence-of-election-misinformation-on-others-reduces-our-own-satisfaction-with-democracy.

360 *See* Owen, *supra* note 356.

361 *See What the Heck Is a Deepfake?*, U. Va.: UVA Info. Sec., https://security.virginia.edu/deepfakes (last visited July 15, 2025).

362 *See* Cybersecurity & Infrastructure Sec. Agency, Risk in Focus: Generative A.I. and The 2024 Election Cycle 1 (2024), https://www.cisa.gov/sites/default/files/2024-01/Consolidated_Risk_in_Focus_Gen_AI_Elections_508c.pdf.

Because a majority of Americans now rely on digital platforms for news, deepfakes' ability to spread misinformation at low-cost and high-speed poses an acute threat to election security.[363] Malicious actors exploit deepfake technology to manipulate political landscapes, harm political candidates and election officials, and impugn the veracity of election results.[364] Even when experts create programs to identify deepfakes, developers simply respond with more sophisticated tactics to evade detection.[365]

In the United States, politicians and malicious third-party actors alike leverage generative-AI to serve their respective agendas. For example, Florida Governor Ron DeSantis's unsuccessful presidential campaign released political ads in 2023 with deepfake images of President Trump embracing Dr. Anthony Fauci, a source of deep suspicion and aggravation within Trump's political base.[366] Such specious content is especially pernicious in the days before an election, when there is little time to debunk the material—or "unring the bell."[367] Deceptive advertising is intended to influence both the manner in which voters cast their ballots and their decision to cast ballots at all. In 2024, robocalls using President Joe Biden's voice encouraged New Hampshire residents to abstain from participating in the primary election.[368] Thus, deepfakes can deprive the public of the accurate information they need to make informed decisions in elections.[369]

Meanwhile, the "liar's dividend"—the strategic exploitation of public uncertainty surrounding AI-generated content—enables politicians to discredit authentic materials by falsely attributing them to artificial manipulation. This dynamic, in turn, creates a powerful means for evading accountability,

363 *See generally* Todd C. Helmus, RAND Corp., Artificial Intelligence, Deepfakes, and Disinformation 1 (July 6, 2022), https://doi.org/10.7249/PEA1043-1. For example, one professor was able to make a deepfake of himself in eight minutes for eleven dollars. *See* Shannon Bond, *It Takes a Few Dollars and 8 Minutes to Create a Deepfake. And That's Only the Start*, NPR (Mar. 23, 2023), https://www.npr.org/2023/03/23/1165146797/it-takes-a-few-dollars-and-8-minutes-to-create-a-deepfake-and-thats-only-the-start.

364 *See* N. David Bleisch, *Deepfakes and American Elections*, A.B.A. (May 6, 2024), https://www.americanbar.org/groups/leadership/office_of_the_president/american-democracy/resources/deepfakes-american-elections.

365 *See* U.S. Gov't Accountability Off., GAO-24-107292, Science & Tech Spotlight: Combating Deepfakes (2024).

366 Conservative vitriol against Dr. Anthony Fauci stems from his COVID-19 mitigation polices. *See* Shannon Bond, *DeSantis Campaign Shares Apparent AI-Generated Fake Images of Trump and Fauci*, NPR (June 8, 2023), https://www.npr.org/2023/06/08/1181097435/desantis-campaign-shares-apparent-ai-generated-fake-images-of-trump-and-fauci.

367 For example, a deepfake audio recording of pro-Western candidate Michael Šimečka talking about rigging the election went viral in the days before Slovakia's October 2023 election. Experts believe this video influenced the results. *See* Daniel I. Weiner & Lawrence Norden, *Regulating AI Deepfakes and Synthetic Media in the Political Arena*, Brennan Ctr. for Just. (Dec. 5, 2023), https://www.brennancenter.org/our-work/research-reports/regulating-ai-deepfakes-and-synthetic-media-political-arena.

368 *See* News Press, N.H. Dep't of Just., Voter Suppression AI Robocall Investigation Update (Feb. 6, 2026), https://www.doj.nh.gov/news/2024/20240206-voter-robocall-update.html.

369 *See* Chris Burnett, *Regulating AI Deepfakes and Synthetic Media in the Political Arena*, Brennan Ctr. for Just. (Dec. 5, 2023), https://www.brennancenter.org/our-work/research-reports/regulating-ai-deepfakes-and-synthetic-media-political-arena.

as politicians can dismiss legitimate evidence of wrongdoing as fabricated.[370] For instance, Warren County Mayor Jim Fouts claimed in 2021 that audio tapes of him making derogatory comments were phony and engineered, though they were in fact authentic.[371] Once people are armed with the knowledge that deepfakes exist and are prevalent, they are quicker to question the authenticity of the events portrayed in videos or photos.[372]

Like social media and AI-generated content, conventional news outlets' reporting practices can undercut the public's uptake of election information. Previous elections demonstrate how news outlets play a critical role in the public's understanding and acceptance of election outcomes.[373] Particularly on election night, live broadcast shows can fuel concerns over the integrity of elections by incorrectly or prematurely "calling" a district or state. Although election-night reporting may appear definitive, actual vote counts are not finalized until sometime later. In fact, final election totals may differ from those reported on election night.[374]

Lawsuits against mainstream media outlets pose a serious threat to freedom of the press and democratic accountability.[375] By targeting crucial election reporting, these suits risk chilling constitutionally protected speech and undermining the public's right to an informed electorate.[376] Rather than correcting misinformation, unfounded lawsuits against news outlets often aim to punish unfavorable coverage and impose financial or reputational burdens that deter robust journalism.[377] The First Amendment was designed precisely to prevent this kind of interference.[378] As the Supreme Court famously explained in *New York Times Co.* v. *Sullivan*, "uninhibited, robust, and wide-open" debate on public issues is indispensable to a functioning of democracy.[379] Weaponizing lawsuits against

370 *See* Josh A. Goldstein & Andrew Lohn, *Deepfakes, Elections, and Shrinking the Liar's Dividend*, Brennan Ctr. for Just. (Jan. 23, 2024), https://www.brennancenter.org/our-work/research-reports/deepfakes-elections-and-shrinking-liars-dividend.

371 *See New Audio Clips Catch Warren Mayor Jim Fouts Allegedly Talking About Black People, Women*, CBS News (Jan. 16, 2017), https://www.cbsnews.com/detroit/news/new-audio-clips-allegedly-catch-warren-mayor-jim-fouts-taking-about-black-people-old-women.

372 *See* Goldstein & Lohn, *supra* note 370.

373 *See* Edward B. Foley, A.B.A., Increasing Trust in Our Elections (May 6, 2024), https://www.americanbar.org/groups/public_interest/election_law/american-democracy/our-work/increasing-trust-our-elections/.

374 *See* Sarah J. Eckman et al., Cong. Rsch. Serv., R46565, Federal Election Results: Frequently Asked Questions 3 (2022).

375 *See* Freedom of the Press Found., *We Plan to Sue If Paramount Settles with Trump over CBS Lawsuit,* Freedom Press Found. (May 23, 2025), https://freedom.press/issues/we-plan-to-sue-if-paramount-settles-with-trump-over-cbs-lawsuit/.

376 *See* Aissatou Diallo, *The Chilling Effect: Trump's Legal Challenge on Free Speech and Journalistic Independence*, Colum. Undergrad. L. Rev. (June 2, 2025), https://www.culawreview.org/current-events-2/the-chilling-effect-trumps-legal-challenge-on-free-speech-and-journalistic-independence.

377 *See* Ellen Ioanes, *Trump's Media Lawsuits Could Do Serious Damage to America's Free Press*, Vox (Dec, 18, 2024), https://www.vox.com/donald-trump/391810/trump-media-lawsuits-abc-slapp-des-moines-register.

378 U.S. Const. amend. I.

379 376 U.S. 254 (1964)

the press endangers that principle and erodes public trust in election outcomes.

PROPOSED SOLUTIONS

Public and private actors can take steps to combat the dissemination of election falsehoods.

In February 2025, the ABA House of Delegates passed a resolution concerning GenAI digital replicas.[380] The report accompanying the resolution called for federal legislation to address the proliferation of unauthorized digital replicas and deepfakes. The Task Force endorses this.

Congress can adopt state-tested solutions and amend election disclosure requirements to include AI-generated content. There are, at present, two forms of legislation pending in Congress and state legislatures: (1) those requiring disclosure of AI-generated campaign ads, and (2) those prohibiting the use of deceptive deepfakes intended to harm candidates or influence election outcomes.[381]

The Task Force concurs with the view that regulators should not be empowered to designate content "fake news"—an authority with potential for misuse in a free society. Instead of laws that would wholly bar AI-generated campaign ads, which would likely be unconstitutional, the Task Force encourages disclosure requirements that are not unduly burdensome and are more likely to pass constitutional muster.[382] Laws regulating and requiring disclosure present the most viable path to addressing the spread of deceptive deepfakes. Regulating AI-generated election content through disclosure laws ensures that citizens are cognizant of manipulated video, images, and text.

State legislatures have already made great strides in this area. As of June 2024, state legislatures had put forth over 100 bills in forty-two states to regulate deepfakes.[383] Two states have stood apart in their approach to combat deepfakes: Wisconsin and Arizona.[384] On March 21, 2024, Wisconsin Governor Tony Evers signed into law A.B. 664, which requires political campaign-affiliated entities to add a disclaimer when using generative AI for released content.[385] A.B. 664 broadly defines "synthetic media" to reach "audio or video

380 The 2025 Resolution was sponsored by the Section on Intellectual Property Law. It states: RESOLUTION RESOLVED, that the American Bar Association supports, in principle, federal legislation protecting an individual's right to authorize or prevent any use of their voice, visual likeness, or image in a realistic computer-generated electronic representation; FURTHER RESOLVED, that any such legislation should include strong safeguards to ensure the legislation's compatibility with the First Amendment; and, FURTHER RESOLVED, that any such legislation should consider its impact on the right of publicity and the right of privacy under state, territorial or tribal law, technological innovation and creations, and potential third-party liability.

381 *See* Foley, *supra* note 373.

382 *See* L. Paige Whitaker, Cong. Rsch. Serv., IF12468, Artificial Intelligence (AI) in Federal Election Campaigns: Legal Background and Constitutional Considerations for Legislation 2 (2023).

383 *See New State Legislative Efforts to Stem the Tide of AI-Generated Election Disinformation*, Voting Rts. Lab (Mar. 26, 2024), https://votingrightslab.org/2024/03/26/new-state-legislative-efforts-to-stem-the-tide-of-ai-generated-election-disinformation.

384 *Id.*

385 *See* 2024 Wis. Sess. Laws 123.

content that is substantially produced in whole or in part by means of generative [AI]"[386] but narrowly applies to campaign-affiliated entities.[387] Failure to comply is punishable by a $1,000 fine.

On May 21, 2024, Arizona passed two bills into law, H.B. 2394 and S.B. 1359, to combat deceptive AI practices in political ads. Unlike Wisconsin's legislation, both Arizona laws are limited to AI-generated impersonations of candidates or officials. Both laws also carve out exceptions for media, satire, internet providers covered by Section 230 of the Communications Decency Act, and "public figures"[388] in view of potential First Amendment concerns. Under S.B. 1359, offenders face criminal penalties for failure to disclaim the use of generative-AI for content released ninety days prior to an election.[389] Under H.B. 2394, private actors can bring a civil cause of action against individuals spreading AI-generative material and seek an injunction or monetary damages.[390] We support states' creative efforts to combat disinformation through deepfake disclosure laws.

At the federal level, there has been legislation offered in Congress regarding AI-generated content. The Task Force supports this legislation. The Protect Elections from Deceptive AI Act, introduced by Senator Amy Klobuchar (D-MN) in the 119th Congress would amend the Federal Election Campaign Act of 1971 to prohibit a person, political committee, or other entity from intentionally distributing "materially deceptive" AI-generated media in carrying out a Federal election activity or of a covered individual for the purpose of (1) influencing an election or (2) soliciting funds.[391] The legislation directly bars election content meant to deceive, but it would only reach deliberately deceptive and fraudulent political ads. Additionally, the bill creates a civil cause of action for aggrieved candidates to seek an injunction or monetary damages and does not impose criminal sanctions.[392]

To be sure, the interplay of mandatory disclosure laws, individual privacy rights, and constitutional protections of free speech complicate attempts to legislate in this area. But the Task Force recommends that Congress consider the proposals in the Protect Elections from Deceptive AI Act as important bulwarks to protect the integrity of election information and any further legislative options to address the growing concern of AI-generated ads in election cycles.

Second, the Task Force encourages private industry to continue to adopt policies that guard against the spread of deceptive AI in elections. Private industry has already taken several positive steps. In February 2024, twenty-seven leading tech companies signed the Munich Security Conference tech accord,

386 *Id.*

387 Political-campaign affiliated entities include a candidate committee, legislative campaign committee, political action committee, independent expenditure committee, political party, recall committee, or referendum committee. *See id.*

388 *See New State Legislative Efforts to Stem the Tide of AI-Generated Election Disinformation*, *supra* note 383.

389 *See id.*

390 *See id.*

391 *See* Protect Elections from Deceptive AI Act, S. 1213, 119th Cong. (2025).

392 *See id.*

including Google, Meta, Microsoft, OpenAI, and TikTok.[393] These signatories acknowledged the danger of deceptive AI and its power to deceive the public in ways that threaten the integrity of electoral processes.[394] Each company agreed to eight commitments, each pledging to: develop technology to prevent creation of deceptive AI election content; assess AI models for election-related risks; detect deceptive AI election content on platforms; respond effectively to deceptive AI election content; collaborate across the industry to counter AI-drive election risks; increase transparency in AI election policies; engage with civil society and experts; and educate the public on AI-generated election content.[395] However, some have criticized the accord for its lack of enforceable regulation.[396] This Task Force concurs with the view that policymakers should establish enforcement mechanisms, transparency requirements, and safeguards to help assess real progress and address AI-related election risks.

Likewise, the Task Force supports continued efforts by key social media companies as they update their policies to guarantee greater transparency of content creation. Companies with such policies include: Google, which now requires that verified election advertisers disclose the use of generative-AI;[397] Meta, which mandates that political advertisers disclose the use of AI or digital manipulation;[398] and Microsoft, which recently piloted its "Content Credentials as a Service" program to flag AI created or edited content.[399] Private initiatives to establish industry norms against generated-AI are critical to protecting the integrity of the electoral process.

Finally, news media outlets can implement enhanced election night reporting to contextualize fluctuating results and combat disinformation.[400] Media outlets must continue to adhere to responsible reporting practices on election night.[401] Although speedily "calling" races is important, news organizations must

393 *See* Abdiaziz Ahmed, Owen Doyle, David Evan Harris, & Lawrence Norden, *Tech Companies Pledged to Protect Elections from AI — Here's How They Did*, Brennan Ctr. for Just. (Feb. 13, 2025), https://www.brennancenter.org/our-work/research-reports/tech-companies-pledged-protect-elections-ai-heres-how-they-did; Allison Mollenkamp & Clara Apt, *Tracking Tech Company Commitments to Combat the Misuse of AI in Elections*, Just Sec. (Mar. 28, 2024), https://justsecurity.org/93823/tracking-tech-company-commitments-to-combat-the-misuse-of-ai-in-elections.

394 *See* Ahmed et al., *supra* note 393.

395 *See id.*; *A Tech Accord to Combat Deceptive Use of AI in 2024 Elections*, MSC, https://securityconference.org/en/aielectionsaccord/ (last visited July 21, 2025).

396 *See* Ahmed et al., *supra* note 393.

397 *See Updates to Political Content Policy (September 2023)*, Google, https://support.google.com/adspolicy/answer/13755910?hl=en (last visited May 31, 2024).

398 *See Meta Requires Political Advertisers to Mark When Deepfakes Used*, BBC (Nov. 9, 2023), https://www.bbc.com/news/technology-67366311.

399 *See* Brad Smith & Teresa Hutson, *Microsoft Announces New Steps to Help Protect Elections*, Microsoft (Nov. 7, 2023), https://blogs.microsoft.com/on-the-issues/2023/11/07/microsoft-elections-2024-ai-voting-mtac; *see also* Brad Smith, *Meeting the Moment: Combating AI Deepfakes in Elections Through Today's New Tech Accord* (Feb. 16, 2024), https://blogs.microsoft.com/on-the-issues/2024/02/16/ai-deepfakes-elections-munich-tech-accord.

400 *See* Foley, *supra* note 373.

401 *See id.*

also play the essential role of contextualizing unofficial results as they are released.[402] There is an enormous obligation on journalists to help the public understand results and trends. This includes informing the public that each district has its own rules, and variation in the timing of races being called is not a sign of fraud or other problems.

In the 2020 elections, news outlets incorporated new techniques around projecting and announcing election outcomes. For example, most news outlets exercised caution in the terminology they used while projecting election results, distinguishing races that were "too early to call" from those "too close to call."[403] However, these distinctions may still be insufficiently clear to the public. Most major news outlets also reported estimated percentages of total ballots counted rather than percentages of precincts with completed counts, because the latter was increasingly misleading due to the rise in mailed-in ballots.[404]

News organizations took further precautionary measures ahead of the 2024 election. The Associated Press took additional steps to explain its reporting methodologies. The New York Times assigned reporters on election night to search for conspiracy theories in hopes of debunking false stories quickly. Similarly, NBC News created a Vote Watch team that monitored misinformation efforts and assigned reporters to keep watch in areas where the election was expected to be close.[405] An ongoing challenge for news organizations will be determining whether the public interest is better served by exposing and correcting false claims through coverage, or whether such exposure risks amplifying and entrenching the misinformation, or, worse still, the risk that news organizations are themselves accused of bias. The Task Force encourages news outlets to continue responsible reporting practices and supports ongoing work to improve and build upon them.[406] For example, efforts to delineate terms such as "calling" versus "projecting" election results will be essential to promote transparency and minimize the risk of public misperception.

H. Role of Cyberspace in the Democratic Process

The cybersecurity of our election infrastructure is essential to preserving the integrity of election results.[407] In the aftermath of the 2016 elections, Congress and other government agencies adopted a

402 *See* Bipartisan Pol'y Ctr. & AP, How Media Outlets Call Races from Unofficial Election Results (2024), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2024/10/BPC_AP_Media_Election_Explainer.pdf.

403 *See id*

404 *See id.*

405 David Bauder, *To Fight Misinfo, News Outlets Are Putting Plans In Place to Combat False Election Night Stories*, AP News (Oct. 25, 2024), https://apnews.com/article/misinformation-trump-harris-election-night-65c7dd8f9d7eb2e6e5c47afd837da2e1.

406 *See* Nic Cheeseman, *Don't Call the Race Too Early*, Foreign Pol'y (Nov. 3, 2020), https://foreignpolicy.com/2020/11/03/dont-call-the-race-too-early.

407 *See* Butler, *supra* note 11.

proactive posture to guarantee that election cybersecurity is defensible and resilient. In 2017, the Department of Homeland Security (DHS) designated election infrastructure as critical following Russian cyberattacks.[408] That classification provides states and localities with necessary access to cybersecurity protections. Additionally, Congress created the Cybersecurity and Infrastructure Security Agency (CISA) as a component of DHS to protect critical infrastructure from physical and cyber threats, including for elections.[409] The threat landscape continues to evolve. Foreign malign actors deploy advanced hacking tools to infiltrate systems, undermine trust, and interfere with the integrity of the election process.[410] As threats to the election systems develop, the United States must adjust to safeguard the democratic process. The Task Force recommends continued and systemic efforts to patch vulnerabilities in our democracy to foreign interference and influence. The Task Force also denounces calls to roll back funding of CISA.

PROBLEM STATEMENT

The 2016 election highlighted the potential for a cyberattack by foreign adversaries on election infrastructure. By 2018, the Senate Intelligence Committee and the Department of Justice both confirmed that Russia attempted attacks on election systems.[411] Although the Committee found no evidence that Russia manipulated actual votes, this is little consolation when many voting systems in this country provide no auditable paper trail to verify vote counts.[412]

Since 2016, the United States has taken critical steps to improve election cybersecurity.[413] This included designating the U.S. election system as part of the nation's "critical infrastructure;"[414] incorporating the newly-created CISA cybersecurity sensors in state and local election offices;[415] transitioning away

408 *See* Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector, U.S. Dep't of Homeland Sec. (Jan. 6, 2017), https://www.dhs.gov/archive/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical [hereinafter Statement by Secretary Jeh Johnson].

409 *See* 132 Stat. 4168 (2018).

410 *See* Bleisch, *supra* note 364.

411 *See generally Open Hearing on Foreign Influence Operations' Use of Social Media Platforms (Third Party Expert Witnesses): Hearing on S Hrg. 115-397 Before the Select Comm. on Intel.*, 115th Cong. 397 (2018) (discussing how the Russian government directed extensive activity, beginning in at least 2014 and carrying into at least 2017, against U.S. election infrastructure at the state and local level).

412 *See* Butler, *supra* note 11.

413 Congress has invested over $805 million to updates election security. *See* Andrea Córdova McCadney et al., *2020's Lesson for Election Security*, Brennan Ctr. for Just. (Dec. 16, 2020), https://www.brennancenter.org/our-work/research-reports/2020s-lessons-election-security (citing *Election Security Grants*, U.S. Election Assistance Comm. (Apr. 16, 2024), https://www.eac.gov/grants/election-security-funds).

414 *See* Statement by Secretary Jeh Johnson, *supra* note 408. Critical infrastructure refers to "[s]ystems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." 42 U.S.C. § 5195c(e).

415 *See* Statement by Secretary Jeh Johnson, *supra* note 408.

from voting machines that lack paper records of voters' ballots;[416] pursuing active efforts to disable foreign hacking groups;[417] and utilizing technology better equipped at detecting coordinated disinformation campaigns.[418] As a result, the 2020 election was in fact one of the most secure from cyberattacks in American history.[419]

The 2024 elections faced and weathered similar disinformation and critical infrastructure cyberattacks. Days before the 2024 election, the Office of the Director of National Intelligence (ODNI), FBI, and CISA labeled Russia as the "most active threat" among foreign adversaries that aimed to undermine public confidence in the integrity of U.S. elections and stoke divisions among Americans.[420] Russian attacks included false videos and articles claiming swing state officials planned to orchestrate election fraud and had manufactured fake overseas ballots to favor Vice President Harris.[421] Iran generated fake media to suppress votes, stoke violence, and compromise former President Trump's campaign.[422] The U.S. intelligence community properly identified threats heading into the 2024 election and pointed voters towards information from trusted sources such as state and local election officials. Ultimately, by all accounts, 2024 was a safe and secure election.[423] CISA stated that it found no evidence that any malicious activity had a material impact on the security or integrity of the election.[424]

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416 *See* Joseph Marks & Tonya Riley, *The Cybersecurity 202: The 2020 Election Is Far More Secure than Four Years Ago. But Experts Are Still Eyeing These Five Things.*, Wash. Post (Nov. 3, 2020), https://www.washingtonpost.com/politics/2020/11/03/cybersecurity-202-2020-election-is-far-more-secure-than-four-years-ago-experts-are-still-eyeing-these-five-things.

417 *See* Julian E. Barnes, *U.S. Cyber Command Expands Operations to Hunt Hackers From Russian, Iran, and China*, N.Y. Times (Mar. 3, 2023), https://www.nytimes.com/2020/11/02/us/politics/cyber-command-hackers-russia.html?smid=tw-share.

418 Ellen Nakashima & Josh Dawsey, *Russian Hackers Who Disrupted 2016 Election Targeting Political Parties Again, Microsoft Says*, Wash. Post (Sept. 10, 2020), https://www.washingtonpost.com/national-security/russian-hackers-who-disrupted-2016-election-targeting-political-parties-again-microsoft-says/2020/09/10/301dd5fe-f36c-11ea-bc45-e5d48ab44b9f_story.html.

419 The CISA found no evidence that the voting system was compromised in 2020. *See* Press Release, Cybersecurity & Infrastructure Sec. Agency, Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), https://www.cisa.gov/news-events/news/joint-statement-elections-infrastructure-government-coordinating-council-election; *see generally* Major Garrett & David Becker, The Big Truth (Diversion Books 2022).

420 Press Release, Cybersecurity and Infrastructure Sec. Agency, Joint ODNI, FBI, and CISA Statement (Nov. 4, 2024), https://www.cisa.gov/news-events/news/joint-odni-fbi-and-cisa-statement-1.

421 *Id.*

422 *Id.*

423 Steve Inskeep, *Cybersecurity Expert Discusses the Integrity of the 2024 Election,* NPR (Nov. 6, 2024), https://www.npr.org/2024/11/06/nx-s1-5172879/cybersecurity-expert-discusses-the-integrity-of-the-2024-election.

424 Press Release, Jen Easterly, Director of Cybersec. & Infrastructure Sec. Agency, Statement from CISA Director Easterly on the Security of the 2024 Elections (Nov. 6, 2024), https://www.cisa.gov/news-events/news/statement-cisa-director-easterly-security-

Although officials have made great progress toward election cybersecurity, critical gaps persist. COVID-19 necessitated a great expansion of voting options, like vote-by-mail, absentee voting, and early voting. These voting mechanisms (which we support) have enabled voter participation, and, at the same time, exacerbated concerns about ballot security.[425] Foreign hackers continue to attempt to infiltrate election systems.[426] Election deniers encourage suspicion by capitalizing on the public's heightened awareness of potential foreign influence.[427] Taken together, these conditions create an environment ripe for politicized claims of election interference. When the public loses faith in the defensibility of election security, they lose faith in the integrity of the entire democracy. The Task Force recommends that the Nation continue to consider and adopt measures to secure voting equipment and systems.

There are essentially five offensive cyber techniques that could be deployed against election systems:[428]

- Distributed denial-of-service (DDoS) attacks interrupt users' access to computer systems by flooding the systems with illegitimate traffic.[429] Such an attack could hinder a voter's ability to access voting information.[430]
- Malware, which is malicious software that introduces spyware, viruses, and ransomware into a system, which then gives hackers control over records.[431] In the election context, a ransomware attack could leak voter registration data or lock down systems during critical operation periods.[432]
- Structured query language (SQL) injections, like malware, are coding techniques that insert malicious bugs into user-end devices,[433] allowing hackers to access

2024-elections.

425 *See* L. Paige Whitaker, Cong. Rsch. Serv., LSB10470, Election 2020 and the COVID-19 Pandemic: Legal Issues in Absentee and All-Mail Voting 1 (2020).

426 *See* Eric Manpearl, *Securing U.S. Election Systems: Designating U.S. Election Systems as Critical Infrastructure and Instituting Election Security Reforms*, 24 B.U. J. Sci. & Tech. L. 168, 175 (2018).

427 *See* Sue Halpern, *Behind the Campaign to Put Election Deniers in Charge of Elections*, New Yorker (Sept. 20, 2022), https://www.newyorker.com/news/daily-comment/behind-the-campaign-to-put-election-deniers-in-charge-of-elections.

428 *See* Daniel Barabander, *Cyberattacks and Election Integrity*, 4 Geo. L. Tech. Rev. 665, 665 (2020).

429 *See id.*

430 *See Cybersecurity Toolkit and Resources to Protect Elections*, Cybersec. & Infrastructure Sec. Agency, https://www.cisa.gov/cybersecurity-toolkit-and-resources-protect-elections (last visited July 21, 2025).

431 *See* Barabander, *supra* note 428, at 666 ("[A]ttackers can also use malware to attack these election systems to produce a specific desired result, such as manipulating vote counts on a voting machine or changing a person's voting registration status on an e-pollbook.").

432 *See Cybersecurity Toolkit and Resources to Protect Elections*, *supra* note 430.

433 *See How to Protect Against SQL Injection Attacks*, U.C. Berkeley, https://security.berkeley.edu/education-awareness/how-protect-against-sql-injection-attacks (last visited July 21, 2025).

and destroy data.[434] SQL injections have previously resulted in data leaks and voter registration delays.[435]

- Phishing attacks, which masquerade as a trusted entity, prompt a victim to provide sensitive information to the attacker.[436] An attacker can then use the information to obtain access to otherwise restrictive voting systems.[437]

- Disinformation campaigns, which use false accounts and content to spread lies designed to sway public opinion on individual candidates or parties, divide Americans, or undermine confidence in the integrity of the electoral process, especially in swing states.

Malicious actors commonly attempt to target voting machines. There are two types of voting machines in elections: optical-scan machines and direct recording electronic machines (DREs). Optical-scan machines digitally record a voter's hand-marked paper ballot.[438] This system provides a paper trail that voters and post-election auditors can reference to confirm a digital vote's veracity. By comparison, DREs record votes digitally.[439] Some DREs provide a paper record of a voter's electronic selection; then, the voter can confirm that the vote indicated through the user interference reflects the vote recorded in the paper receipt. Others provide no record.[440] On these paperless computerized voting systems, voters indicate their candidate choices through a user interface, and the computer program transmits and tallies them.

CISA and various cybersecurity experts list paperless electronic voting machines as one of the top vulnerabilities in the voting systems.[441] When voting machines do not produce paper trails, the only record of the vote is the machine itself, which canvassers cannot audit.[442] Federal law largely refrains from regulating states' voting technology choices. However, paperless, computer-based

434 *See* Marian K. Schneider, *Election Security: Increasing Election Integrity by Improving Cybersecurity*, *in* The Future of Election Administration 243, 252 (Mitchell Brown et al. eds., 2019).

435 Chuck Goudie & Christine Tressel, *How the Russians Penetrated Illinois Election Computers*, ABC7 (July 4, 2020), https://abc7chicago.com/russia-russian-hacking-elections-illinois/3778816/.

436 *See Phishing Attacks*, Imperva, https://www.imperva.com/learn/application-security/phishing-attack-scam (last visited June 5, 2024).

437 *See* Matthew Cole et al., *Top-Secret NSA Report Details Russian Hacking Effort Days Before 2016 Election*, Intercept (June 5, 2017), https://theintercept.com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effortdays-before-2016-election (describing the phishing attacks on Arizona and Illinois's election systems).

438 *See The Verifier – Voting Equipment – November 2020*, VerifiedVoting, https://verifiedvoting.org/verifier/#mode/navigate/map/ppEquip/mapType/normal/year/2022 (last visited July 21, 2025).

439 *See id.*

440 *See* Kimberly Breedon & A. Christopher Bryant, *Counting the Votes: Electronic Voting Irregularities, Election Integrity, and Public Corruption*, 49 Univ. Mem. L. Rev. 979, 989 (2019).

441 *See* Andrew Appel, *Is Internet Voting Trustworthy? The Science and the Policy Battles*, 21 U.N.H. L. Rev. 523, 531 (2023); *see also* Marc Schneider, *Protect Public Trust by Auditing Elections: It's Easier Than You Might Think*, The Hill (Nov. 3, 2018), https://thehill.com/opinion/campaign/414631 -protect-public-trust-by-auditing-elections-its-easier-than-you-might-think.

442 *See* Appel, *supra* note 441, at 527.

voting systems are so inherently insecure that courts in New Jersey and Georgia have found them unconstitutional.[443] In those cases, New Jersey and Georgia election sites had relied on DREs that were indirectly connected to the internet via an election-management system (EMS).[444] The New Jersey court held that election systems may not be indirectly connected to the internet through the EMS, given cybersecurity concerns.[445] Similarly, the Georgia court enjoined the use of paperless DRE voting machines, which precipitated the use of paper ballots in the 2020 elections.[446]

Malicious actors also target voter registration databases. These databases reflect a single, computerized list containing personal identification of every legally registered voter in the state. Experts consider voter registration databases the most vulnerable aspect of election systems because they are almost always connected to the Internet and thus susceptible to hacking and manipulation.[447] The impact of hacking voter registration databases can be severe. Malicious cyber actors can render voters ineligible to vote in the state by, for example, marking them as felons; delete voter entries in databases, thereby forcing voters to cast provisional ballots; change a voter's address information, create entries for voters, or add fictious voters to the database; and launch a DDoS attack to disrupt the database and connected e-pollbooks.[448]

Given the array of emerging cyberthreats, protecting the security of voting machines and voter registration databases must be a top priority for future elections.

PROPOSED SOLUTIONS

Our Nation must continue to enhance the cyber resilience of state and federal election infrastructure to safeguard the integrity of future elections. As the lead federal agency for national election security, CISA has made tremendous strides in helping local governments enhance their election systems' cyber-capabilities. CISA offers state and local governments a comprehensive toolkit of free resources for cyber threat prevention, protection, response, and recovery.[449] However, CISA must remain proactive in its approach to adapt to an ever-evolving threat landscape. Although a hyper-technical analysis is beyond the scope of this report, there are various preventative practices that all state and local governments can implement to ensure that future elections remain secure. The Task Force recommends implementing stronger cybersecurity protocols; encouraging partnerships between government at all levels, the private sector, and the global community; transitioning nationwide to hand-marked paper ballot voting machines; and affirming

443 *See generally* Gusciora v. McGreevey, 929 A.2d 599, 599 (N.J. Super. Ct. App. Div. 2006), *rev'd sub nom.* Gusciora v. Corzine, No. MER-L-2691-04, 2010 N.J. Super. Unpub. LEXIS 2319, at *1 (N.J. Super. Ct. L. Div. Feb. 1, 2010); Curling v. Raffensperger, 397 F. Supp. 3d 1334, 1339 (N.D. Ga. 2019).

444 *See* Gusciora, 2010 N.J. Super. Unpub. LEXIS 2319, at *27; *see also* Curling, 397 F. Supp. 3d at 1350.

445 *See* Gusciora, 2010 N.J. Super. Unpub. LEXIS 2319, at *353.

446 *See The Verifier – Voting Equipment – November 2020*, *supra* note 438.

447 *See* Manpearl, *supra* note 426, at 175.

448 *See id.*

449 *See Cybersecurity Toolkit and Resources to Protect Elections*, *supra* note 430.

election results with post-election risk-limiting auditing.

The aforementioned efforts, which have been historically spearheaded by CISA, and the recommendations to follow require sustained staffing and reliable federal funding. Robust and continuous investment in CISA is critical to ensure the Agency's capacity to lead efforts in threat monitoring, incident reporting, infrastructure enhancement, and the coordination of federal, state, and local election security protocols. The Task Force opposes recent and proposed cuts that would significantly diminish CISA's operational capacity. Such reductions would impair the Agency's ability to defend election infrastructure and jeopardize the security and legitimacy of the democratic process. To maintain public confidence and ensure the continued integrity of elections, it is imperative that CISA be adequately resourced to meet the complex and growing cybersecurity demands of the electoral system.

1. Cybersecurity protocols

We recommend that state-level authorities adopt pre-election cybersecurity measures that leverage new techniques to respond to emerging threats. This includes strengthening election systems' cyber hygiene by requiring regular software updates, two-factor authentication, and strong password polices; mandating employee cybersecurity training to minimize human-errors in phishing attempts; ensuring that election systems are not connected directly or indirectly to the Internet; leveraging automated threat intelligence programs to sift through global data and uncover offensive cyber-trends; using machine learning to assess networks for anomalous activity that may indicate a cyber breach; and creating an incident response protocol to mitigate any repercussions from cyberattacks efficiently.[450] State authorities should also participate in nationwide information sharing networks to preempt cyberattacks. Currently, CISA facilitates the federal-state exchange of threat intelligence through the Multi-State Information Sharing and Analysis Center and the Elections Infrastructure Information Sharing and Analysis Center.[451] CISA also provides weekly reports on election vulnerabilities to nearly 1,000 election infrastructure stakeholders.[452] To ensure that CISA is sharing the fullest information, states must actively contribute to these information platforms.

2. Private, public, and global partnerships

Beyond state-wide efforts, CISA should foster public-private sector partnerships to leverage private companies' capabilities.[453] Today, private tech companies innovate faster than government bureaucracies can keep

450 *See* Emil Sayegh, *Election 2024: Championing Proactive Cybersecurity To Fortify National Security*, Forbes (Apr. 23, 2024), https://www.forbes.com/sites/emilsayegh/2024/04/23/election-2024-championing-proactive-cybersecurity-to-fortify-national-security/?sh=1550e7004500.

451 *See Cybersecurity Toolkit and Resources to Protect Elections*, *supra* note 430.

452 Jen Easterly, *Opening Statement by CISA Director Jen Easterly at the Update on Foreign Threats to the 2024 Elections Hearing*, Cybersec. & Infrastructure Sec. Agency: Blog (May 15, 2024), https://www.cisa.gov/news-events/news/opening-statement-cisa-director-jen-easterly-update-foreign-threats-2024-elections-hearing. Additionally, CISA has cleared 230 election officials to receive classified briefings. *See id.*

453 *See* Sayegh, *supra* note 450.

pace.[454] Rather than grow complacent with outdated security systems, the government should capitalize on these achievements and encourage private companies' support in securing future elections. In February 2024, twenty-seven leading tech companies signed the Munich Security Conference tech accord.[455] The signatories agreed to detect misleading AI-generated content and attach provenance signals to identify the content's origin where feasible.[456] Additionally, CISA should strengthen alliances with global partners to bolster cross-border cooperation and incident responses to cyberattacks.[457] Such efforts would be part of a broader, long-term strategy to form international agreements aimed at cyber norm-setting. For instance, the Carnegie Endowment has proposed drafting a new agreement that would prohibit cyber-attacks on critical infrastructure and develop a global accountability mechanism for cyberspace.[458] Such an agreement would protect U.S. election systems under their new status as "critical infrastructure."[459] CISA should foster private and global collaboration to counter the cyberthreat landscape.

3. Paper-ballot voting systems

Next, we recommend that states continue to transition to hand-marked optical-scan voting machines.[460] Recent trends reflect states' rapid transition to hand-marked ballot voting machines. Counties in all but two states, Louisiana and Texas, have moved to voting systems with a paper trail.[461] In 2016, about 22% of registered voters lived in jurisdictions using electronic voting machines with no paper trail.[462] By the November 2024 elections, it was estimated that around 98% of all votes would be cast on paper, representing an increase from 93% of votes in 2020.[463] Beyond the rulings in the New Jersey and Georgia courts, other states like Indiana, Kentucky, Mississippi, and Texas have also passed laws mandating that voting systems produce a paper record of every vote.[464] The Task Force

454 *See* James Andrew Lewis, *National Security and the Innovation Ecosystem*, CSIS (Oct. 1, 2021), https://www.csis.org/analysis/national-security-and-innovation-ecosystem.

455 *See* Mollenkamp & Apt, *supra* note 393; Ahmed et al., *supra* note 393.

456 *See A Tech Accord to Combat Deceptive Use of AI in 2024 Elections*, *supra* note 395.

457 *See* Sayegh, *supra* note 450.

458 *See* Patryk Pawlak & Aude Géry, *Why the World Needs a New Cyber Treaty for Critical Infrastructure*, Carnegie Endowment (Mar. 28, 2024), https://carnegieendowment.org/research/2024/03/why-the-world-needs-a-new-cyber-treaty-for-critical-infrastructure?lang=en&center=europe.

459 *See* Statement by Secretary Jeh Johnson, *supra* note 408. For a definition of critical infrastructure, *see supra* note 415.

460 *See* Breedon & Byrant, *supra* note 440, at 992.

461 Derek Tisler & Lawrence Norden, *Some Good News for Donald Trump: We Already Use Paper Ballots*, Brennan Ctr. for Just. (Aug. 23, 2024), https://www.brennancenter.org/our-work/analysis-opinion/some-good-news-donald-trump-we-already-use-paper-ballots [hereinafter Tisler & Norden, Some Good News].

462 *See id.*

463 *See id.*

464 *See* Derek Tisler & Turquoise Baker, *Paper Ballots Helped Secure the 2020 Election — What Will 2022 Look Like?*, Brennan Ctr. for Just. (May 10, 2022), https://www.brennancenter.org/our-work/analysis-opinion/paper-ballots-helped-secure-2020-election-what-will-2022-look.

supports states' efforts to shift away from DRE machines in favor of voting systems with a paper trail.

No known technology can currently secure internet voting.[465] Variations of internet voting—for instance, cryptographic protocols that create an audit trail—are still vulnerable to hacks targeting the end-user's device.[466] Machines that produce paper trails insulate votes from electronic tampering and facilitate post-election audits.[467] Then, election workers can verify that votes cast accurately reflect votes counted.

After collecting paper ballots through reliable voting machines, states should use machine tabulation for initial ballot counts and post-election audits.[468] We support machine tabulation as more accurate, trustworthy, and efficient than hand-counting.[469] In recent years, election deniers have expressed unfounded concerns that voting tabulation systems are programmed to mis-record votes. Some election officials have heeded these concerns and spearheaded efforts to replace tabulation with hand-counting. For instance, Arizona officials unsuccessfully petitioned the Pima County Superior Court to prohibit voting tabulation systems given their "untrustworthy" nature.[470] Despite pockets of aversion to machine tabulation, it is used in over 90% of U.S. election jurisdictions and enjoys wide support by security experts.[471] Using scanners to mechanize the counting process circumvents concerns with clerical errors.[472]

In this vein, we believe states should pair machine counting systems with robust, post-election, or risk-limiting auditing (RLAs).[473] Using paper provides a chain of evidence that auditors can assess for the correctness of the count. Specifically, RLAs spot-check for discrepancies between electronic and paper records with reported outcomes at a pre-

465 *See* Breedon & Byrant, *supra* note 440, at 991–92.

466 *See* Appel, *supra* note 441, at 529.

467 *See* Matt Zdun, *Machine Politics: How America Casts and Counts Its Votes*, Reuters (Aug. 23, 2022), https://www.reuters.com/graphics/USA-ELECTION/VOTING/mypmnewdlvr.

468 *See* Alice Clapman, Brennan Ctr. for Justice, How States Can Prevent Election Subversion in 2024 and Beyond 17 (2023).

469 *See generally* Ansolabehere et al., *Learning from Recounts*, 12 Election L. J. 100 (2018).

470 *See* Bob Christie, *Arizona County's Plan to Hand-Count Ballots Blocked by Judge*, AP News (Nov. 7, 2022), https://apnews.com/article/2022-midterm-elections-arizona-government-and-politics-714a45e76973de132c84cbde0ca5c1b2.

471 *See* Rachel Orey et al., *How Ballot Tabulators Improve Elections*, Bipartisan Pol'y Ctr. (Apr. 25, 2022), https://bipartisanpolicy.org/explainer/how-ballot-tabulators-improve-elections/; *see also* Clapman, *supra* note 468.

472 *See* Zdun, *supra* note 467.

473 The *ABA Election Administration Guidelines and Commentary*, adopted by the ABA House of Delegates as policy, addresses risk-limited auditing in Section 10.5: "To enhance voter confidence in reported election results, election authorities are encouraged to conduct post-election risk-limiting audits on all contested election races." *See also An Overview of Election Auditing*, American Bar Association (last visited Aug. 30, 2025), https://learningcenter.americanbar.org/courses/79368; *An Overview of Election Auditing*, The Chicago Bar Association (Oct. 26, 2023), https://learn.chicagobar.org/products/an-overview-of-election-auditing-102623.

determined level of confidence.[474] For instance, an RLA with a risk tolerance of 10% has a 90% chance of correcting the recorded outcome if wrong. Not only do RLAs increase public confidence in election results, but experts have determined them "robust enough to detect [vote-changing] cyberattacks."[475] Even if CISA has found no evidence of election interference, strong auditing procedures promise to detect any vote tampering, thereby increasing the public's trust in election results. We recommend incorporating RLAs into the state's post-election practices.

I. Lawyers' Obligations to the Rule of Law and Democracy

Lawyers must play an essential role in upholding the rule of law. Indeed, "[t]he cornerstone of the American system of justice is an independent judiciary and an independent bar willing to tackle unpopular cases, however daunting."[476] In many cases, lawyers are the last line of defense when individuals are deprived of their rights. By helping aggrieved parties access their day in court, lawyers enhance the process and legitimacy of our governing institutions. And if and when their clients' rights are vindicated, lawyers prevent actual injustice from befalling the American people. However, both legitimacy and justice are imperiled when the stability, predictability, and finality of our legal system are lost to political vicissitudes. In light of troubling recent developments, strengthening the legal profession's commitment to constitutional democracy and the rule of law must be top priorities.

PROBLEM STATEMENT

Rule of law values, long unquestioned by the legal profession, are under tremendous strain. Politicians, lawyers, and law professors have suggested that government officials are entitled to disregard court orders they disagree with.[477] Though President Trump has said on several occasions that he will respect the federal courts when they rule against him,[478] his Administration's actions have at times spoken louder than these words. Slow compliance with Judge Paula Xinis's (D. Md.) order to facilitate the return of Kilmar Ábrego-García—a Salvadoran man granted withholding of removal in 2019 yet unlawfully deported without due process in March 2025—and a Supreme Court ruling affirming most

474 *See* Foley, *supra* note 373; *see also* KAREN L. SHANTON, CONG. RSCH. SERV., IF11873, ELECTION ADMINISTRATION: AN INTRODUCTION TO RISK-LIMITING AUDITS 1 (2021).

475 *See* Breedon & Byrant, *supra* note 440, at 995 (citing Eric Geller, *Colorado to Require Advanced Post-Election Audits*, POLITICO (July 17, 2017), https://www.politico.com/story/2017/07/17/colorado-post-election-audits-cybersecurity-240631).

476 *See* Wilmer Cutler Pickering Hale and Dorr LLP v. Exec. Off. of President, No. CV 25-917 (RJL), 2025 WL 1502329 at *1 (D.D.C. May 27, 2025).

477 Charlie Savage & Minho Kim, *Vance Says 'Judges Aren't Allowed to Control' Trump's 'Legitimate Power'*, N.Y. TIMES (Feb. 9, 2025), https://www.nytimes.com/2025/02/09/us/politics/vance-trump-federal-courts-executive-order.html.

478 *See, e.g.*, Brett Samuels, *Trump says he'll abide by court orders that block parts of his agenda,* The Hill (Feb. 11, 2025).

of that order[479] raised serious questions as to whether the Trump Administration would openly defy the judiciary.[480] Despite admitting that Ábrego-García's deportation was a mistake, administration officials argued they were under no obligation to bring him back for minimal procedural hearings guaranteed by the Constitution.[481] "Drawing the country toward the brink of a constitutional crisis," the Administration eventually took two months to return Ábrego-García from a notorious Salvadoran prison.[482]

Further, several judges have been threatened by members of Congress and the President with articles of impeachment for their decisions, drawing a rare rebuke from Chief Justice John Roberts, who noted that punishing judges for rendering decisions at odds with an administration's policy preferences has been disfavored in this country for over two-hundred years.[483]

The House of Representatives recently passed legislation that would limit federal judges' ability to punish those who disobey court orders; the provision was removed before the bill became law.[484] Without access to the contempt power, the judiciary would lose a vital tool that helps promote institutional respect for and compliance with its decisions.[485] This calls to mind President Andrew Jackson's famous quip that Chief Justice John Marshall "has made his decision[,] now let him enforce it."[486]

The legal profession itself is also under direct threat. Numerous major law firms have

479 Hamed Aleaziz & Alan Feuer, *How Trump Officials Debated Handling of the Abrego Garcia Case: 'Keep Him Where He Is'*, N.Y. Times (May 21, 2025), https://www.nytimes.com/2025/05/21/us/politics/trump-abrego-garcia-el-salvador-deportation.html.

480 *See, e.g.*, Lawrence Hurley & Ken Dilanian, *What Happens if a President and the Federal Government Fail to Follow a Judge's Orders?*, NBC News (Apr. 16, 2025), https://www.nbcnews.com/politics/politics-news/president-defies-judges-orders-contempt-rcna201455.

481 Michael Kunzelman, *Trump Administration Argues Judge Cannot Order Return of Man Mistakenly Deported to El Salvador*, AP News (Apr. 5, 2025), https://apnews.com/article/trump-el-salvador-prison-kilmar-abrego-garcia-5a92d6bd7f893eed64c2607cc129a6f9.

482 Katherine Faulders, James Hill & Alexander Mallin, *Kilmar Abrego Garcia Brought Back to US, Appears in Court on Charges of Smuggling Migrants*, ABC News (June 6, 2025), https://abcnews.go.com/US/mistakenly-deported-kilmar-abrego-garcia-back-us-face/story?id=121333122.

483 Lisa Mascaro, *Republicans Eye Actions Against the Courts and Judges as Trump Rails Against Rulings*, AP News (Mar. 25, 2025), https://apnews.com/article/trump-judge-boasberg-musk-impeachment-1019459fc9517231204b814fd6f36127. For a list of the federal judges threatened with impeachment so far, see N.Y.C. Bar, *Statement Condemning Threats to Impeach Federal Judges Based on Disagreement with Rulings* (Mar. 31, 2025), https://www.nycbar.org/press-releases/statement-condemning-threats-to-impeach-federal-judges-based-on-disagreement-with-rulings/.

484 Michael Gold, *Republican Bill Would Limit Judges' Contempt Power*, N.Y. Times (May 22, 2025), https://www.nytimes.com/2025/05/22/us/politics/trump-policy-bill-judges-contempt.html. *See* One Big Beautiful Bill Act, Pub. L. No. 119-21, H.R. 1, 119th Cong. (2025).

485 *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 Harv. L. Rev. 685 (2018).

486 President Jackson is quoted as having made this statement in response to *Worcester* v. *Georgia*, 31 U.S. 515 (1832), in which the Supreme Court held that the state of Georgia could not apply its laws to lands belonging to the

been targeted for engaging in client advocacy that the current administration opposes in an effort to chill constitutionally protected speech and petition.[487] Despite drawing universal rebuke from the courts, which have so far weighed in on this issue,[488] the current Administration continues to make "absurd" claims to punish the President's political rivals and all others willing to stand in his way.[489] The Administration also issued a blanket warning to the legal profession in the form of a directive instructing the Attorney General and the Secretary of Homeland Security to aggressively pursue sanctions and other disciplinary actions against lawyers who sue the federal government.[490] Taking aim at the ABA, the Attorney General has alleged that the almost 150-year-old non-partisan organization—which is currently comprised of lawyers who represent a broad cross-section of American political and social life—secretly favors the Democratic Party.[491] Lawyers are uniquely qualified to support and defend the Constitution and the rule of law; they must neither be complicit with nor intimidated by these blatant scare tactics.

Lawyers who bravely refuse political demands to violate the law should be celebrated, not condemned. Erez Reuveni, the lawyer in charge of defending the government in the Ábrego-García case, was fired by Attorney General Pam Bondi for failing to "zealously advocate on behalf of the United States."[492] Behind closed doors, Reuveni bravely adhered to legal principles and counseled bringing Ábrego-García back to the country after he was mistakenly deported, as was standard practice in prior administrations (including during President Trump's first term).[493] Then, in front of Judge Xinis, Reuveni admitted that Ábrego-García was mistakenly removed.[494] In what one of his colleagues perceived as "an act of intimidation" and as part of an effort

Cherokee. Matthew Washauer, *Andrew Jackson and the Constitution*, The Gilder Lehrman Inst. of Am. Hist. (2009), https://www.gilderlehrman.org/history-resources/essays/andrew-jackson-and-constitution.

487 Harold Hongju Koh, Fred Halbhuber & Inbar Pe'er, *No, The President Cannot Issue Bills of Attainder*, Just Sec. (Apr. 9, 2025), https://www.justsecurity.org/110109/president-cannot-issue-attainder-bills/ ("27 former senior government officials of both political parties, who served in the last seven presidential administrations, confirmed that they 'have never before seen or condoned an *ad hominem* punitive, and retaliatory order of this kind, attacking and intimidating lawyers and a law firm on the basis of their lawful activities.'").

488 *See* Zach Montague, *Trump Loses Another Battle in His War Against Elite Law Firms*, N.Y. Times (May 27, 2025), https://www.nytimes.com/2025/05/27/us/politics/trump-law-firms-wilmerhale.html.; *see also* Wilmer Cutler Pickering Hale and Dorr LLP v. Exec. Off. of President, No. CV 25-917 (RJL), 2025 WL 1502329 (D.D.C. May 27, 2025); Perkins Coie LLP v. U.S. Dep't of Just., No. CV 25-716 (BAH), 2025 WL 1276857 (D.D.C. May 2, 2025); Jenner & Block LLP v. U.S. Dep't of Just., No. CV 25-916 (JDB), 2025 WL 1482021 (D.D.C. May 23, 2025).

489 *See Wilmer Cutler Pickering Hale and Dorr LLP*, 2025 WL 1502329 at *9.

490 Shayna Jacobs, *New Trump Memo Seen as Threat to Lawyers, Attempt to Scare Off Lawsuits*, Wash. Post (Mar. 23, 2025), https://www.washingtonpost.com/national-security/2025/03/22/trump-litigation-lawyers-pam-bondi/.

491 Tiana Headley, *Bondi Eliminates ABA's Role in Vetting Trump Judicial Nominees*, Bloomberg L. (May 29, 2025), https://news.bloomberglaw.com/us-law-week/bondi-eliminates-abas-role-in-vetting-trump-judicial-nominees.

492 Aleaziz & Feuer, *supra* note 479.

493 *Id.*

494 *Id.*

to put Department of Justice lawyers "in an impossible position where [they] have to decide between keeping [their] job pushing a partisan agenda, or maintaining [their] ethical obligation to the court and thus [their] bar license," Reuveni was promptly let go.[495] Rather than being summarily terminated, lawyers like Reuveni who abide by their best legal judgments and obligations of candor toward tribunals—as state supreme court rules of professional conduct require[496]—should be recognized for their integrity and courage.[497]

In sum, the rule of law is under siege. Lawyers must lead the defense. Without a recommitment to democracy, we may not remain an "Empire of Laws, and not of men" for much longer.[498]

PROPOSED SOLUTIONS

1. Clarify and strengthen standards of professional conduct

The Task Force recommends that the ABA, state, and local bar associations continue recent efforts to address threats to democracy, the rule of law, and the independence and legitimacy of the courts.

The ABA has spoken out several times in recent months in defense of the rule of law.[499] So too have many state and local bar associations. The New York State Bar Association hosted a webinar earlier this year dedicated to discussing challenges to the rule of law.[500] In March 2025, more than 50 metropolitan, affiliate, specialty, regional, and local bar associations signed a joint statement condemning the President's executive orders targeting law firms.[501] The State Bar of California released a similar statement reaffirming lawyers' right and duty to represent even the most unpopular

495 *Id*. (quoting Erin Ryan, a former Department of Justice trial lawyer who resigned in response to Reuveni's firing).

496 *See, e.g.*, Model Rules of Pro. Conduct r. 1.1, 1.2(d) (A.B.A. 2023).

497 *See* Jeffrey Toobin, Opinion, *For Trump, Investigations Are the Real Punishment*, N.Y. Times (June 18, 2025), https://www.nytimes.com/2025/06/18/opinion/trump-investigations-damage.html.

498 *See* John Adams, Thoughts on Government (1776), *reprinted in* 4 The Adams Papers 86 (Robert J. Taylor ed., 1979).

499 *See, e.g.*, A.B.A., *The ABA Supports the Rule of Law* (Feb. 10, 2025), https://www.americanbar.org/news/abanews/aba-news-archives/2025/02/aba-supports-the-rule-of-law/; A.B.A., *The ABA Rejects Efforts to Undermine the Courts and the Legal Profession* (Mar. 3, 2025), https://www.americanbar.org/news/abanews/aba-news-archives/2025/03/aba-rejects-efforts-to-undermine-courts-and-legal-profession/.; Bill Bay, *The Next Day*, A.B.A. J. (June-July 2025), https://www.abajournal.com/magazine/article/the-next-day.

500 Rebecca Melnitsky, *New York State Bar Association To Examine Hot-Button Issue of Challenges to the Rule of Law*, N.Y. State Bar Ass'n (Mar. 6, 2025), https://nysba.org/new-york-state-bar-association-to-examine-hot-button-issue-of-challenges-to-the-rule-of-law/.

501 N.Y.C. Bar Ass'n, *In Defense of the Rule of Law and the Independence of the Legal Profession* (Mar. 24, 2025). https://www.nycbar.org/press-releases/in-defense-of-the-rule-of-law-and-the-independence-of-the-legal-profession/.

clients.[502] The Task Force commends these bar organizations for their willingness to speak out; their words send an invaluable signal to their memberships, the legal profession, the American people, and the world that our rule of law will persist. But bar associations can and should do more than proclaim their principles. The Task Force recommends the following:

Revise the Oath of Admission

Upon being licensed by a state supreme court to practice law in a jurisdiction, attorneys take an oath of admission.[503] The precise wording of this oath varies from state to state. However, many oaths include a commitment to civility and integrity, the rules of professional conduct, and the state and federal constitutions.[504] Given growing threats to democracy and the rule of law, and the vital role that lawyers can play in safeguarding these important principles, the Task Force recommends that oaths of admission be updated to include a commitment to upholding democracy and the rule of law. To this end, we recommend that the ABA propose model language for state supreme courts to add to their oath of admission. The model language could be as simple as "I do solemnly swear to support democracy and the rule of law." While simple, this addition would allow the legal profession to signal (and hopefully internalize) a clear-eyed, unambiguous commitment to these basic but important principles.

Reform Lawyer Professional Responsibility

Going a step further, the Task Force recommends that a commitment to upholding democracy and the rule of law become a matter of professional responsibility for all lawyers, with particular focus on lawyers in public service. Specifically, the Task Force recommends the following:

First, bar associations should reiterate that government lawyers—federal, state, and local—are subject to the rules of professional conduct like all other members of the Bar. In April 2025, the Ethics Committee of the New York City Bar Association issued an opinion which declared "[a]ny lawyer who violates . . . Rules [of Professional Conduct] at the behest of a client or employer—whoever that client or employer may be—is still subject to professional discipline for such violation."[505] The opinion focused specifically on the obligation of government lawyers who may be instructed by their superiors to act in ways they perceive to be contrary to law.[506] The

502 State Bar of Cal., *Statement on Recent Executive Actions Threatening the Availability of Legal Counsel and the Rule of Law* (May 9, 2025), https://www.calbar.ca.gov/About-Us/News/News-Releases/statement-on-recent-executive-actions-threatening-the-availability-of-legal-counsel-and-the-rule-of-law.

503 Robert Anthony Gottfried, *The Anatomy of Our Oath to Support the US Constitution*, A.B.A. (Jan. 8, 2021) https://www.americanbar.org/groups/young_lawyers/resources/after-the-bar/professional-development/anatomy-of-our-oath/.

504 *See, e.g.*, *Attorney Oath of Office: State of Alabama*, Alabama State Bar Ass'n, https://www.alabar.org/assets/2015/03/WEBSITE-Oath-of-Office.pdf (last visited July 21, 2025).

505 Pro. Ethics Comm., N.Y.C. Bar Ass'n, *Formal Opinion 2025-1: Ethical Responsibilities of Lawyers Representing Government Officers and Agencies* (Apr. 4, 2025), https://www.nycbar.org/reports/formal-opinion-2025-1-ethical-responsibilities-of-lawyers-representing-government-officers-and-agencies/.

506 *Id.*

Task Force recommends that the ABA consider issuing a similar ethics opinion

Second, the Task Force *discourages* rules that defer state disciplinary proceedings against certain government lawyers until after they leave public office. For example, Rule 3-7.16(d) of the Florida Bar Rules of Discipline states that "[i]nquiries raised or complaints presented to the Florida Bar about the conduct of a constitutional officer who is required to be a member in good standing of the Florida Bar must be commenced within 6 years after the constitutional officer vacates office."[507] In our view, regulators should at least have the discretion to begin proceedings while the government attorney is still in office.[508] While the Task Force appreciates the burdens and responsibilities of public office (some Task Force members have themselves been government lawyers), government attorneys are subject to state laws and rules, and local federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that state.[509] If anything, the privilege of public office should demand a higher degree of professional ethics, not a lower one. A rule requiring deferral of an investigation and proceeding effectively derails accountability for government lawyers while the matter is fresh and accountability matters most. By the time the attorney leaves public office, recollections and resolve will almost certainly have faded. Meanwhile, the public may face the prospect of ongoing, irreparable harm by a malfeasant government attorney undeterred by the prospect of disciplinary proceedings at some point off in the future.

Third, the Task Force recommends that the Department of Justice consider strengthening its guidance to government lawyers regarding their obligations to the courts. This might take the form of an amendment to the Justice Manual, which in part defines the standards of conduct for attorneys at the Department of Justice.[510] We also encourage the Professional Responsibility Advisory Office at the Department of Justice to develop and share best practices with client federal departments and agencies, as well as state and federal bar associations, so that all attorneys who appear in court on behalf of any governmental entity understand that they are both legally and ethically bound by court orders.

Finally, the Task Force recommends that the ABA, state and local bar associations, state-level supreme courts, and other state-level regulatory bodies provide further guidance concerning the special obligations of lawyers to respect and promote the rule of law, our

507 *See* Jay Weaver, *Group accuses Bondi of 'misconduct' as Attorney General; Florida Bar rejects complaint*, Miami Herald (June 7, 2025), https://www.miamiherald.com/news/politics-government/article307770070.html#storylink=cpy. *See also* Florida's Rules of Discipline Rule 3-7.16(d) ("Inquiries raised or complaints presented by or to The Florida Bar about the conduct of a constitutional officer . . . must be commenced within 6 years after the constitutional officer vacates office.")

508 *See* James Kobak and Albert Feuer, *State Bars Must Probe Misconduct Claims, Even If It's The AG*, Law360 (July 10, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5347584.

509 *See* the "McDade-Murtha Amendment," now codified in federal law at 28 U.S.C. 530B, which states that federal government lawyers are bound by the professional responsibility rules of the state and territorial jurisdictions in which they practice.

510 *See* U.S. Dep't of Just., Just. Manual § 1-4.000 (2018).

democracy, the courts, and adherence to court orders. The Task Force appreciates that this is easier said than done. Support for democracy and the rule of law are not now well-defined principles. These concepts could mean different things to different regulators at different times, in different circumstances. Further, lawyers should be free to advocate for changes in law, or on occasion (and in good faith) even test the outer boundaries in existing law. Respect for the "rule of law" or our democracy should not be regarded as an intractable adherence to the legal status quo.

Arguably, the ABA's Model Rules and the preamble to the Model Rules already go far in promoting these principles:

- Paragraph 1 of the Preamble: "A lawyer, as a member of the legal profession, is a representative of clients, *an officer of the legal system and a public citizen having special responsibility for the quality of justice*" (emphasis added).

- Paragraph 5 of the Preamble: "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. *A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process*" (emphasis added).

- Paragraph 6 of the Preamble: ". . . *[A] lawyer should further the public's understanding of and confidence in the rule of law* and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority . . ." (emphasis added).

- Rule 3.3, Comment 2: "*This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process* . . . although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false" (emphasis added).

- Rule 3.2(b): "A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

- Rule 8.2, Comment 3: "To maintain the fair and independent administration of justice, lawyers *are encouraged to continue traditional efforts to defend judges and courts unjustly criticized*" (emphasis added).

However, these provisions offer general guidance. Lawyers should be provided with more specific guidance regarding their professional obligation to promote and protect democracy, the rule of law, and the independence and legitimacy of the courts. Further guidance can be provided through bar association opinions interpreting existing rules of professional conduct, and standards that, though not themselves enforceable through professional discipline, express the legal profession's norms, expectations, and aspirations. Lastly, the Task Force

recommends that the ABA, state and local bar associations, state-level supreme courts, and other state-level regulatory bodies assess whether there are gaps in existing rules of conduct, enforceable by discipline, that should be filled to advance these principles. Given the current and evolving environment, we consider this essential.

2. CLE for democracy and rule of law courses

Most state supreme courts require attorneys to complete a certain number of Continuing Legal Education (CLE) credits in the years following bar admission.[511] CLE credit can be earned from a variety of courses, workshops, conferences, and volunteer opportunities, which are developed and hosted by hundreds of providers, including the ABA.[512] States vary in their CLE requirements, and attorneys are generally free to fulfill their CLE requirements as they see fit, through any combination of approved programs. With its widespread, flexible structure, CLE provides a promising avenue for initiating conversations between attorneys about their role in our constitutional democracy. For example, CLE credits could be offered for attending a course about election law or a workshop on the legal ethics of making statements about the electoral system, whether in a representational role or not.[513]

The ABA is a leading provider of CLE courses. The Task Force recommends that the ABA continue to develop courses focused on democracy and the rule of law, which attorneys throughout the United States may take to fulfill their CLE requirements. Alternatively, while state supreme courts set CLE requirements independently, the ABA can encourage states to award CLE credits for courses, workshops, and conferences focused on the law of democracy and the promotion of free and fair elections.

3. Engage with volunteer voter protection efforts

Lawyers can contribute to protecting democracy by volunteering on and around Election Day with voter protection organizations that answer voters' questions, help voters navigate the specific election-related procedures of their town or state, and respond to access issues that arise. Most well-known is the Election Protection hotline organized by the Lawyers' Committee for Civil Rights Under Law, which operates call centers and organizes field volunteers at polling places.[514] Several similar organizations supporting election access and integrity also seek pro bono volunteers, such as the Election Official Legal Defense Network, which provides legal support for election officials;[515] VoteRiders, which helps prospective voters navigate complex voter ID laws;[516] and the voting rights initiatives

511 *See, e.g.*, *MCLE Requirements*, State Bar of Cal., https://www.calbar.ca.gov/Attorneys/MCLE-CLE/Requirements.

512 *See Welcome to the ABA Learning Center*, A.B.A.: Learning Ctr., https://learningcenter.americanbar.org/ (last visited July 21. 2025).

513 *Cf.* King v. Whitmer, 71 F.4th 511, 532–33 (6th Cir. 2023) (affirming imposition of CLE requirement as part of sanction for frivolous election-related lawsuit).

514 *Election Protection Volunteers*, Election Protection, https://866ourvote.org/volunteer/ (last visited June 6, 2025).

515 Election Off. Legal Defense Network, *Attorney and Law Firm Sign Up*, Ctr. for Election Innovation & Rsch., https://eoldn.org/attorney-law-firm-sign-up/ (last visited June 6, 2025).

516 *Volunteer with VoteRiders*, VoteRiders, https://www.voteriders.org/volunteer/ (last visited June 6, 2025).

organized by Campaign Legal Center[517] and the Brennan Center for Justice.[518] A database of opportunities for legal volunteering on longer-term projects to improve voting access can be found through We the Action, a collaboration between the Lawyers' Committee and Civic Nation.[519]

Lawyers can also work or volunteer as election workers or observers in their home state. Doing so provides lawyers with a firsthand view of a given state's election procedures and any issues that might arise. The ABA Standing Committee on Election Law has recently sought to enlist lawyers as election workers through its "Poll Worker, Esq." program.[520] In addition, eight states (Florida, Indiana, Iowa, Kentucky, Nebraska, Ohio, South Carolina, and Virginia) currently offer CLE credit for lawyers who get trained and work the polls.[521] Alternatively, lawyers could volunteer as poll watchers (also referred to as election observers), whose role is simply to monitor elections and ensure that proper procedures are being followed.[522] While the rules vary by state, many poll watchers observe elections on behalf of a particular political party, candidate, nonprofit organization, pollster, academic institution, or government agency.

4. Expand opportunities for engagement with the "law of democracy"

While a growing number of law schools offer electives on "Election Law"[523] and the "Law of Democracy,"[524] not all lawyers have an opportunity to engage with these topics during law school. This means that many lawyers do not get an opportunity to explore the crucial role of the law—and lawyers—in creating conditions for a healthy democracy.

In addition to creating opportunities for such exploration through CLE, the ABA can develop a repository of accessible materials, from handouts to blog posts, about key issues surrounding the law of democracy. These resources could be housed, for example, in the ABA's Division for Public Education.[525] This would allow lawyers (and other interested parties) to self-study how the law shapes our political system. This knowledge could raise lawyers' awareness of the role they

517 *Information for Lawyer Volunteers*, Campaign Legal Ctr., https://campaignlegal.org/information-lawyer-volunteers (last visited June 6, 2025).

518 *Partner With Us*, Brennan Ctr. for Just., https://www.brennancenter.org/get-involved/partner-us (last visited June 6, 2025).

519 We the Action: Connecting Lawyers with Causes, https://wetheaction.org (last visited June 6, 2025).

520 Jason Douglas Kaune, *Poll Worker, Esq.: How Lawyers Can Serve on Democracy's Frontline*, A.B.A. (Feb. 22, 2024), https://www.americanbar.org/groups/young_lawyers/resources/after-the-bar/public-service/poll-worker-esq-how-lawyers-can-serve-on-democracys-frontline.

521 *Id.*

522 *Poll Watchers*, U.S. Election Assistance Comm'n (Oct. 3, 2024), https://www.eac.gov/election-officials/poll-watchers.

523 *See, e.g.*, *Election Law – Law 382-001*, Antonin Scalia L. Sch., Geo. Mason Univ., https://www.law.gmu.edu/assets/files/academics/schedule/2023/spring/quinnvonspakovsky_382-s.pdf (last visited June 6, 2025).

524 *See, e.g.*, *Law of Democracy*, Stan. L. Sch., https://law.stanford.edu/courses/law-of-democracy (last visited June 6, 2025).

525 Division for Pub. Educ., *Resources*, A.B.A., https://www.americanbar.org/groups/public_education/resources/ (last visited June 6, 2025).

can play in upholding democracy and equip them to engage with pro-democracy causes more effectively. Because lawyers often serve as trusted sources of information about the law for the larger community, more democratically informed lawyers are vital resources at a moment when distrust in elections and election-related information remains pervasive.[526]

J. Curbing Frivolous Election-Related Lawsuits

Frivolous election-related lawsuits are not a new phenomenon, but the 2020 presidential election saw a nationwide barrage of litigation challenges. Dozens of lawsuits were filed across the country by both Democrats and Republicans.[527] Since the 2020 election, baseless election lawsuits are becoming more common in state and local elections.[528]

In fact, prior to Election Day 2024, more voting-related lawsuits had already been filed than during the entirety of 2020:[529] 217 voting-related lawsuits had been filed by November 5, surpassing the 157 filed in the entirety of 2020 and the 175 filed in 2022 during the midterm election.[530] Meanwhile, there was a decline in post-election-related litigation in 2024 compared to 2020, but it is unclear whether this reduction is attributable to the outcome of the election or to the efficacy of legal, procedural, or administrative measures implemented to deter frivolous claims. Nevertheless, the reality underscores the need to examine institutional and procedural reforms and for continued investment in legal safeguards to deter frivolous election litigation.

PROBLEM STATEMENT

Frivolous election lawsuits present two challenges. First, by their very nature, they are high-profile, filed and litigated on an expedited basis, and threaten to sidetrack an election. Judges assigned to hear them are under extreme pressure. Second, the mere existence of such lawsuits serves to feed baseless conspiratorial suspicions about the integrity of our democracy. Even if a "wrong" lower-court decision is reversed by an appellate court, the damage may already be done, with the outcome of the election irreparably tainted in the minds of the public.[531] Thus, although the lawsuit is ultimately dismissed as baseless,

526 *See* Campaign Legal Ctr., *supra* note 517.

527 *See generally Litigation in the 2020 Election*, A.B.A. (Oct. 27, 2022), https://www.americanbar.org/groups /public_interest/election_law/litigation.

528 For instance, an Arizona gubernatorial candidate engaged in a protracted legal campaign to challenge her loss at the polls in the 2022 election. *See* Jen Fifield, *Why Kari Lake Is Still, Six Months After Losing, in Arizona Courts Arguing the 2022 Election Was Stolen*, Votebeat Ariz. (May 17, 2023), https://www.votebeat.org/arizona/2023/5/17/23726884/kari-lake-lawsuit-fundraising-maricopa-signatures.

529 Matt Cohen, *2024 Is Already The Most Litigated Election On Record*, Democracy Docket (Nov. 4, 2024), https://www.democracydocket.com/news-alerts/2024-is-already-the-most-litigated-election-on-record/.

530 *Id.*

531 In his dissent from the Supreme Court's denial of certiorari for a challenge to Pennsylvania's mail-in ballot procedure, Justice Thomas observed the limitations of judicial review on allegations of election fraud: "In short, the postelection system of judicial review is at most suitable for garden-variety disputes. It generally cannot

the fact of its filing supports a narrative that the election itself was unfair, and the fact of its dismissal may feed suspicions of the same conspiracy. On the other hand, it is important to preserve access to the courts for challenges to election procedures and outcomes. Corrupt or biased political conduct must be rooted out, and civil lawsuits provide an important avenue to do so.[532]

PROPOSED SOLUTIONS

The Task Force recommends legislation at the federal and state levels to require challenges to election procedures and outcomes to go before three-judge panels, accompanied by an expedited appellate pathway.[533] The combined scrutiny of three trial-level judges should help to reduce errors of law. It will also prevent "forum shopping" for specific judges perceived as beholden to certain political interests. Federal law already has a provision that allows for three-judge district courts for certain types of cases.[534] For example, three-judge district court panels were once required in lawsuits seeking injunctive relief against the enforcement of state statutes in federal court, where the parties had a right to appeal directly to the Supreme Court.[535] Current federal law requires a three-judge panel for apportionment challenges under the Voting Rights Act.[536] Expanding panels at the federal level and instituting them at the state level will maintain confidence in the outcome of elections by ensuring that any challenges are streamlined, swift, and, most of all, correct.

The Task Force also recommends that states explore changes in law that allow for special motions to dismiss, cost shifting, and sanctions if a party is found to file a frivolous election-related lawsuit. Most states already have laws to deter frivolous defamation lawsuits, known as strategic litigation against public participation, or "SLAPP."[537] SLAPP litigants file frivolous defamation suits as a tactic to punish speech they dislike, forcing the target to engage expensive legal counsel even if the lawsuit is entirely without merit and quickly dismissed.[538] Anti-SLAPP statutes protect against these kinds of lawsuits by allowing the target to seek dismissal of the case at an early stage, and often permit the

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restore the state of affairs before an election. And it is often incapable of testing allegations of systemic maladministration, voter suppression, or fraud that go to the heart of public confidence in election results. That is obviously problematic for allegations backed by substantial evidence. But the same is true where allegations are incorrect." Republican Party v. Degraffenreid, 141 S. Ct. 732, 737 (2021) (Thomas, J., dissenting from denial of certiorari).

532 Indeed, President Trump prevailed in a small minority of his lawsuits challenging the 2020 election. *See* Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but not a Wipe-Out*, Brookings Inst. (Nov. 30, 2021), https://www.brookings.edu/articles/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out.

533 *See* Clapman, *supra* note 468, at 6.

534 *See* 28 U.S.C. § 2284.

535 *See* Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954–76*, 72 Case W. Rsrv. L. Rev. 909, 914–16 (2022).

536 *See id.* at 921–22.

537 *See* Dan Greenburg et al., Inst. for Free Speech, Anti-SLAPP Statutes: A Report Card 3 (Oct. 2023).

538 *See id.* at 4–5.

recovery of legal costs and fees, thus providing a measure of deterrence for those considering filing such frivolous lawsuits.[539] The Task Force recommends that all states adopt anti-SLAPP statutes to protect against frivolous election-related lawsuits designed to undermine confidence in election results.

The Task Force recognizes that, while anti-SLAPP statutes offer a powerful tool to dismiss meritless election-related lawsuits at an early stage, their practical limitations must be considered. As a result, the Task Force also recommends that courts consider the imposition of attorneys' fees or judicial sanctions when judges determine that a lawsuit was frivolous, unfounded, or filed in bad faith.

This approach is not novel. Courts already have the authority to impose such penalties in a variety of contexts—most notably under Rule 11 of the Federal Rules of Civil Procedure, which permits sanctions for filings that lack legal merit or are intended to harass.[540] Analogous provisions exist in many state courts. New Jersey's Frivolous Litigation Act and Rule 1:4-8 of the state's Rules of Court are prime examples of mechanisms that state courts can adopt to address meritless claims.[541] Similarly, New York's Uniform Rule 130-1.1 vests the court with discretion to award attorneys' fees and sanctions in response to frivolous conduct.[542] Courts have already used these sanctions in the realm of civil litigation to deter abusive litigation tactics and compensate prevailing parties for the cost of defending against baseless claims.[543]

Applying this framework to election-related litigation would serve as a deterrent against lawsuits aimed primarily at casting doubt on legitimate electoral outcomes. Courts can help protect the integrity of the electoral process without chilling legitimate legal claims by signaling that bad-faith legal challenges may carry financial consequences for the attorneys and parties involved. In all, fee-shifting and judicial sanctions provide a well-established and potentially more adaptable means of curbing frivolous election-related lawsuits.

The ABA has conducted programming to help judges navigate the rise in election law litigation.[544] The Task Force urges the ABA Judicial Division to continue efforts to examine the trends and drivers of election-related lawsuits and explore policies, practices, and laws that will help courts respond to concerns over frivolous lawsuits without infringing the fundamental right of access to the judicial system.

539 *See id.*

540 *See* FED. R. CIV. P. 11.

541 *See* N.J. REV. STAT. § 2A:15-59.1 (2022); N.J. CT. R. 1:4-8. *See also* Seth M. Rosenstein, Fighting Back Against Frivolous Lawsuits and Meritless Claims, ANSELL.L., https://ansell.law/fighting-back-against-frivolous-lawsuits-and-meritless-claims/ (last visited July 21, 2025).

542 *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1 (1987).

543 *See, e.g.,* Citigroup Global Markets, Inc. v. Fiorilla, 2018 NY Slip Op. 31919(U)

544 *See U.S. courts prepare for increase in election lawsuits*, ABA News & Insights (Oct. 28, 2024), https://www.americanbar.org/news/abanews/aba-news-archives/2024/10/courts-prepare-for-election-lawsuits/.

K. Enhance Law School Training on our Democracy and Rule of Law

The Task Force endorses the June 18, 2024, letter signed by over 100 law school deans, committing to a greater focus on the rule of law in law school courses and other offerings. The goal should be to train the next generation of lawyers to sustain our constitutional democracy and the rule of law.

PROBLEM STATEMENT

Lawyers play a critical role in upholding the rule of law and sustaining America's constitutional democracy. At a time when the judiciary, democratic norms, and independent institutions of higher education are all under threat, law schools can play a critical role in promoting a greater focus on the rule of law for the next generation of lawyers. At the very least, law schools should prepare their students to make the difficult choices sometimes required to fulfill the oaths they take when admitted to the bar to uphold the Constitution and the rule of law.

PROPOSED SOLUTIONS

Law schools can play a leading role in training lawyers to uphold the rule of law and our constitutional democracy and can host events that encourage the general public to engage in these important topics. As a number of law school deans pledged in their June 18, 2024, letter to all members of the legal profession, training for the next generation of lawyers should include the following elements:

- Teaching students to uphold the highest standards of professionalism, which includes a duty to support our constitutional democracy and, per the Preamble to the Model Rules of Professional Conduct, to "further the public's understanding of and confidence in the rule of law and the justice system;"
- Offering courses, workshops, and events that engage with the rule of law and democracy, and sharing teaching resources through a new clearinghouse that the American Bar Association has created;
- Teaching students to disagree respectfully and to engage across partisan and ideological divides;
- Encouraging students to support and defend the Constitution and the rule of law through clinical work, public education, and advocacy; and
- Supporting public education and events focused on the rule of law and the values of our constitutional democracy.

The Task Force endorses these commitments to enable the next generation of attorneys to participate in rebuilding respect for the rule of law and the American constitutional democracy.

L. "Disagree Better"

Task Force member and former federal appellate Judge Thomas Griffith is a strong advocate for "Disagree Better," an initiative

launched by Utah Governor Spencer Cox and Tennessee Governor Bill Lee in July 2023.[545] The essence of the "Disagree Better" initiative is to foster a culture of civic discourse grounded in mutual respect and constructive engagement. The objective is not merely to cultivate a more courteous or congenial populace—though such outcomes are beneficial—but rather to reframe disagreement as a pathway to problem-solving and policy making.[546] By promoting open and civilized dialogue over polarization, the initiative aspires to enable Americans to navigate conflict productively, thereby enhancing effective governance. As Governor Cox puts it:

> *"I started Disagree Better because I'm deeply concerned at the division and hatred consuming the country. We'll never make progress on important issues when each side thinks the other is the enemy. Politicians need to do better, but there is a role for everyone. There are practical steps, like service, we can all take to heal the divide. I hope the campaign inspires more Americans to discover the transformative power of volunteer service in their communities."*[547]

The Task Force applauds "Disagree Better" and recommends similar initiatives within legislatures, town councils, bar associations, colleges and universities, high schools, churches, community groups, and beyond.

545 *See Disagree Better*, Nat'l Governors Ass'n, https://www.nga.org/disagree-better/ (last visited July 21, 2025).

546 *Id.*

547 Press Release, Nat'l Governors Ass'n, Governors Cox and Lee Host Disagree Better Panel (May 14, 2024), https://www.nga.org/news/press-releases/governors-cox-and-lee-host-disagree-better-panel/.

IV. Conclusion

The Task Force hopes its work and the recommendations herein will foster and strengthen the Nation's timeless, non-partisan values of democracy and rule of law.

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