

DISCONTENT AND DISCORD: THE EFFECT OF ANTI-GOVERNMENT ANIMUS  
ON COMPLIANCE WITH THE NORMS OF GOVERNANCE

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**Abstract**

*As distrust and discontent with government grows, public willingness to conform voluntarily with legal norms declines. Securing these goals through enforcement actions is not just impractical, it is impossible. This Article in part challenges just why the federal regulatory state is perceived so negatively. That the government is perceived negatively, however, is not debatable. It takes years to transform the national belief structure—more than one presidential administration—leading to the obvious question and a surprising answer. Was it the war in Vietnam that darkened expectations of truth from those in power? The unconscionable failure to protect civil rights? Failures in education? All are candidates for the distinction of being the event that changed America's faith in government, but none resulted in a forty-year campaign to convince the American public that our system of civil justice was broken. That distinction goes to tort reform. It is impossible to believe the architects of tort reform intended to play a central role in this crisis of faith in government, with storming the Capitol, or election denialism. Their targets were and are about the nature of tort law and its process. That their message was understood more broadly may be a tragic and unforeseeable consequence. This Article tracks the devolution of public confidence in government through the lens of tort reform and a number of regulatory agencies and programs.*

## INTRODUCTION

Trust and confidence in governance is a predicate for voluntary compliance with the mandates, norms, and policies of our legal system.<sup>1</sup> Events of the last decade—and particularly the last few years<sup>2</sup>—have affected the public’s faith in government and resulted in a decline in voluntary conformity with the edicts and requirements Congress set out and federal agencies implemented. Potent discontent with the federal regulatory state has been intensifying. “[A]ccording to . . . the Pew Research Center . . . eighty-six percent [of the population] . . . are either frustrated or angry with the federal government, . . . [That is the] lowest percentage since Pew began tracking [this] question in 1997.”<sup>3</sup> Beyond discontent, the same survey found a parallel decline in the extent to which people trust government, “with 80 percent of respondents saying they trust the government to do what is ‘right’ only some of the time, or never.”<sup>4</sup>

With the majority of the population expressing discontent and anger toward the federal government, voluntary conformity with regulatory programs has declined in all fields.<sup>5</sup> In the absence of voluntary compliance,

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<sup>1</sup> Chris Dann, *Does Public Trust in Government Matter for Effective Policy-Making?* ECONOMICS OBSERVATORY, July 26, 2022, <https://www.economicsobservatory.com/does-public-trust-in-government-matter-for-effective-policy-making> (“Trust in government . . . increases voluntary compliance towards public policies...”).

<sup>2</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAP., 117<sup>TH</sup> CONG., H.R. No. 117-663, FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE UNITED STATES CAPITOL (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>. [hereinafter SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAP.].

<sup>3</sup> *Public Anger Toward Federal Government Up*, FEDWEEK: FEDERAL MANAGER’S REPORT (Sept. 1, 2011), <https://www.fedweek.com/federal-managers-daily-report/public-anger-toward-federal-government-up/>.

<sup>4</sup> *Id.*

<sup>5</sup> Marc Hetherington and Jonathan M. Ladd, *Destroying Trust In the Media, Science, and Government has Left America Vulnerable to Disaster*, BROOKINGS FOUNDATION ONLINE RESEARCH: PRESENTATION, (May 1, 2020), <https://www.brookings.edu/blog/fixgov/2020/05/01/destroying-trust-in-the-media-science-and-government-has-left-america-vulnerable-to-disaster/> (“decades of politically-motivated attacks [on the media and the regulatory state was taken] to a new level by

agencies are left with enforcement on a case-by-case method which is not just impractical, but impossible. Imagine a system where, in order to collect the revenue to run the federal government, the Internal Revenue Service<sup>6</sup> has to audit every taxpayer or the Securities Exchange Commission must oversee and approve every sale of stock.<sup>7</sup> Nonsensical as this sounds, that is the endgame if large swaths of the public refuse to comply voluntarily with regulatory or judicial mandates. In addition to the economic impossibility of that level of individual enforcement, “[g]overnment officials will invariably be outnumbered and overmatched by the [lobbyists and lawyers representing the larger] regulated entities . . .”<sup>8</sup>

When the public voluntarily embraces and complies with legal norms and regulatory standards, the outcome will be qualitatively better than when those actions are the result of agency-compelled compliance.<sup>9</sup> The Supreme Court embraced this reality of governance decades ago, in *New York v. United States*,<sup>10</sup> explaining that “[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences . . . By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”<sup>11</sup>

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President Trump ... [he] vilified the national media [calling them] “scum” . . . and . . . dishonest . . . the enemy of the people [and demeaned] the Centers for Disease Control . . . [and many] essential government agencies...”).

<sup>6</sup> Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 738 (2003) (explaining how tax law is complex and its implementation “relies on voluntary compliance”).

<sup>7</sup> *Donelin v. Comm’r*, 47 T.C.M. (CCH) 1286 (T.C. 1984) (stating that the tax system is “based upon voluntary compliance ... the effectiveness of the system depends upon the taxpayer's voluntary obedience to the law”).

<sup>8</sup> Cynthia Esstlund, *Labor Law Reform Again? Reframing Labor Law as a Regulatory Project*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 383, 386–87 (2013).

<sup>9</sup> *Snipes v. City of Bakersfield*, 193 Cal. Rptr. 760, 764 (Ct. App. 1983) (“The [Fair Employment and Housing Act] . . . sets out a comprehensive scheme for administrative enforcement, emphasizing conciliation, persuasion, and voluntary compliance”).

<sup>10</sup> 505 U.S. 144 (1992).

<sup>11</sup> *New York v. United States*, 505 U.S. 144, 168 (1992); *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1477 (2018) (citing *New York v. United States* and affirming the virtue of compliance that is voluntary as opposed to the result of command and control action).

## I. MOVING AWAY FROM A CENTURY OF COMPLIANCE

Just what motivated compliance in the past is not so straightforward.<sup>12</sup> Threats of enforcement can compel compliance in the short term but will gain no broad-based support for the arm of government imposing its will.<sup>13</sup> Moreover, the Supreme Court has cautioned against misuse of power in the enforcement actions focused on the questionable use of threats to compel compliance.<sup>14</sup> Threats of tort liability also can be a powerful force in compelling compliance<sup>15</sup> in limited circumstances. However, compliance by compulsion<sup>16</sup> and compliance by voluntarily taking action<sup>17</sup> produce two different outcomes. “Uncoerced compliance” is likely to be longer term, of a higher quality, and more consistent.<sup>18</sup> Thus, it is logical to conclude that coerced compliance is likely to be one-off, grudging, and costly.

One might think that evidencing procedural fairness in enforcement or other forms of compelled compliance would smooth things over and

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<sup>12</sup> Clifford Rechtschaffen, *Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer?* 52 U. KAN. L. REV. 1327, 1361 (2004) (discussing the downside of governing by enforcement as opposed to a policy of encouraging voluntary compliance).

<sup>13</sup> Michael D. Green, *Statutory Compliance and Tort Liability: Examining the Strongest Case*, 30 U. MICH. J.L. REFORM 461, 483 (1997) (“[T]he threat of tort liability assists considerably in effective enforcement of the nation’s drug laws by the FDA, both by encouraging voluntary compliance and by providing leverage for the FDA in informal negotiations.”).

<sup>14</sup> See *Sackett v. EPA*, 566 U.S. 120, 128–31 (2012) (explaining how the EPA’s continuous threats of enforcement exacted too high a toll and were an abuse of the discretion of the agency).

<sup>15</sup> Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1162–63 (1988) (“[T]he Administration has relied extensively on voluntary industry compliance, which only can be successful when a real threat of agency enforcement or tort liability exists”).

<sup>16</sup> *United States v. Florida*, 938 F.3d 1221, 1236 (11th Cir. 2019) (“The Rehabilitation Act was intended to track Title VI, which requires that agencies attempt to achieve voluntary compliance through informal means before terminating funding or taking ‘any other means authorized by law’”); 42 U.S.C. § 2000d-1; 29 U.S.C. § 794a(a)(2).

<sup>17</sup> David J. Teece, *Information Sharing, Innovation, and Antitrust*, 62 ANTITRUST L.J. 465, 476–77 (1994).

<sup>18</sup> *Patterson v. McLean Credit Union*, 491 U.S. 164, 180–81 (1989); *Finnbin, LLC v. United States Consumer Prod. Safety Comm’n*, 45 F. 4th 127, 131 (D.C. Cir. 2022) (explaining that the Consumer Product Safety Commission is bound statutorily to 15 U.S.C. § 2058 and relies heavily on voluntary compliance to implement much of their product safety measures).

create converts to the regulatory or common law mission.<sup>19</sup> Not so. Naturally, the absence of procedural fairness is not going to win over those already predisposed to noncompliance.

The level of discontent referenced above did not happen overnight.<sup>20</sup> Deep-seeded discontent takes years to produce. It takes more than one administration or term of bitter arguments on Capitol Hill to transform a national belief structure, leading to this question: Is there a single or short-term event that may have transformed public trust and faith in government? Was it the assassination of President Kennedy that marked the end of an age of innocence?<sup>21</sup> Did the war in Vietnam darken expectations of truth from those in power?<sup>22</sup> The sustained public outcry over the failure to protect civil rights,<sup>23</sup> failures in public education,<sup>24</sup> or the long-term inexcusable race-driven wealth disparity?<sup>25</sup> All are possible candidates for the distinction of a phenomenon with the potential to change America's faith in government, but none of these cataclysmic events resulted in a forty-year campaign to demonstrate how our system of law and civil justice was broken and radical change was needed. That distinction goes to the movement referred to as "tort reform,"<sup>26</sup> a movement with absolutely no intention to

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<sup>19</sup> Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 369–89 (2019).

<sup>20</sup> *Distrust, Discontent, Anger and Partisan Rancor*, PEW RESEARCH CENTER, POLITICAL PARTIES & POLARIZATION REPORT (April 18, 2010), [www.pewresearch.org/politics/2010/04/18/distrust-discontent-anger-and-partisan-rancor/](http://www.pewresearch.org/politics/2010/04/18/distrust-discontent-anger-and-partisan-rancor/).

<sup>21</sup> Beth Daley, *Can Withering Public Trust in Government be Traced Back to the JFK Assassination?*, THE CONVERSATION (Nov. 21, 2017), <https://theconversation.com/can-withering-public-trust-in-government-be-traced-back-to-the-jfk-assassination-87719>.

<sup>22</sup> *Vietnam War Protests*, HISTORY (Nov. 1, 2022), <https://www.history.com/topics/vietnam-war/vietnam-war-protests>.

<sup>23</sup> Nadra Kareem Nittle, *How the Greensboro Four Sit-In Sparked a Movement*, HISTORY (Jan. 29, 2021), <https://www.history.com/news/greensboro-four-sit-in-civil-rights>.

<sup>24</sup> John Hood, *The Failure of American Public Education: Government is Wholly Unsited to Teach America's Students*, FOUNDATION FOR PUBLIC EDUCATION (Feb. 1, 1993), <https://fee.org/articles/the-failure-of-american-public-education/>.

<sup>25</sup> Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 601 (2018).

<sup>26</sup> Martin A. Kotler, *The Myth of Individualism and the Appeal of Tort Reform*, 59 RUTGERS L. REV. 779, 795–96 (2007) (discussing the myth of the greedy plaintiff' and other mischaracterizations of the system of civil justice); Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 679 (2008) (discrediting the big lie – that the courts and the legal system has been corrupted by attorneys and clients determine to become wealthy beyond the dreams of avarice by virtue of a failed model of civil justice); Scott DeVito & Andrew W. Jurs, *Doubling-Down for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 545 (2014); Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral*

undermine government or alienate the public. The effect was a completely unintended consequence.

It is ridiculous to think that the architects of tort reform<sup>27</sup> expected to play a role of any kind in the crisis of faith in government at the core of this Article, that they had the slightest thing to do with the storming of the Capital,<sup>28</sup> election denialism,<sup>29</sup> or the creation of militias contemplating the overthrow of the government.<sup>30</sup> Their targets (e.g., strict liability, joint and several liability, excessive damage awards, etc.) are about the nature of tort law and process. It was unforeseeable that their message may have been understood more broadly. That said, it is hard to find any other well-funded plan that, for forty years (and counting), sent out the message that there is something wrong with our legal system.

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*Source Rule and Its Abolition: An Economic Perspective*, 15 KAN. J.L. & PUB. POL'Y 57, 61 (2005) (By design, tort reform undermined large swaths of the civil justice system through massive lobby efforts. Legislation that not only undermined the legitimate purposes of tort law, namely, compensation, indemnity, restitution and deterrence, but is economically unsound).

<sup>27</sup> One of those architects of tort reform, Victor Schwartz, is considered by many to be the father of American tort law. He is a distinguished lawyer, law professor, former dean at the University of Cincinnati Law School, and lead author of the most widely used casebook in the field, PROSSER, WADE, AND SCHWARTZ, TORTS, CASES AND MATERIALS, 14<sup>TH</sup> ED. (2020). It is unthinkable that he advocated for anything more than a change in tort law that made the system more balanced. Dean Schwartz targeted improvements in tort law, not the decimation of public trust in government.

<sup>28</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAP., *supra* note 2.

<sup>29</sup> Reid J. Epstein, *As Faith Flags in U.S. Government, Many Voters Want to Upend the System*, N.Y. TIMES (July 13, 2022), <https://www.nytimes.com/2022/07/13/us/politics/government-trust-voting-poll.html> (“A majority of American voters across nearly all demographics and ideologies believe their system of government does not work . . . [and] a broad majority of Republicans share [former President Trump’s view] on the 2020 election and its aftermath: Sixty-one percent said he was the legitimate winner”).

<sup>30</sup> Tamantha Gunn, *FBI Stops Violent Militia’s Plan to Overthrow Government and Kidnap Michigan Governor*, REVOLT (Oct. 8, 2020), <https://www.revolt.tv/article/2020-10-08/68504/fbi-stops-violent-militias-plan-to-overthrow-government-and-kidnap-michigan-governor/> (discussing the arrest of 13 men allegedly planning to kidnap Gov. Gretchen Whitmer and make her stand “trial for treason,” as part of a “conspiracy to overthrow the government”).

## II. NONCOMPLIANCE: THE MESSAGE MATTERS

High on the list for causes of the palpable discontent noted above are messages from the White House attacking the very essence of regulation.<sup>31</sup> One such message was “drain the swamp,” former President Donald J. Trump’s campaign slogan, repeated throughout his presidency.<sup>32</sup> It was an attack phrase with an obvious target: the whole of the existing regulatory state.<sup>33</sup> Then-White House Chief of Staff, Mick Mulvaney, explained the purpose of drain the swamp as finding ways to fire or otherwise get rid of those who work in the bureaucracy.<sup>34</sup> A less-charged way of saying this is that our “constitutional democracy needs major reforms or a complete overhaul.”<sup>35</sup> Should this negative impression continue and expand, it will leave federal agencies<sup>36</sup> without the capacity to do their jobs and “their authority . . . so compromised and tenuous that they are unworthy of public respect . . . [and without] moral authority to command.”<sup>37</sup> Professor and political scientist Margaret Levi summarizes Trump’s effect thusly: “[D]istrust is a natural outgrowth of former President Donald J. Trump’s domination of the party and, to a large degree, American politics.”<sup>38</sup> The belief that former President Trump is the sole source of this disenchantment is Democratic Party dogma. One survey from Siena College showed that “92 percent [of Democrats] said Mr. Trump threatened American democracy.”<sup>39</sup>

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<sup>31</sup> Jeffrey M. Jones, *Trust in Federal Government Branches Continues to Falter*, GALLUP NEWS (Oct. 11, 2022), <https://news.gallup.com/poll/402737/trust-federal-government-branches-continues-falter.aspx> (discussing how trust in the federal government is declining precipitously).

<sup>32</sup> Rebecca Harrington, *Here's What Trump Means When He Says 'Drain the Swamp' — Even Though It's Not an Accurate Metaphor*, THE INSIDER (Nov. 11, 2016), <https://www.businessinsider.com/what-does-drain-the-swamp-mean-was-dc-built-on-a-swamp-2016-11>.

<sup>33</sup> Margaret Levi, Audrey Sacks, & Tom Tyler, *Conceptualizing Legitimacy, Measuring Legitimizing Beliefs*, 53 AM. BEHAV. SCI. 354, 369 (2009) (explaining that the goal of draining the swamp is held by “those who would prefer to strangle the state”).

<sup>34</sup> Paul Bedard, *Mulvaney Cheers for More Federal Workers to Quit, "Wonderful Way" to Drain Swamp*, WASH. EXAM’R (Aug. 3, 2019, 8:10 AM), <https://washingtonexaminer.com/washington-secrets/mulvaney-cheers-for-more-federal-workers-to-quit-wonderful-way-to-drain-swamp> [<https://perma.cc/LN3F-BAC9>].

<sup>35</sup> *Id.*

<sup>36</sup> Michael R. Harris, *Environmental Deliberative Democracy and the Search for Administrative Legitimacy: A Legal, Positivism Approach*, 44 U. MICH. J. L. REFORM 343 (2011).

<sup>37</sup> Levi et al., *supra* note 32.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

The Republican Party, however, has not cornered the market on distrust and discontent. Within the domain of Democrats, there is abundant “pessimism about the future stemm[ing] from their party’s inability to protect abortion rights . . . [or] pass gun control [legislation such that] Democrats . . . have lost trust in government . . .”<sup>40</sup>

This distrust and anger toward regulation and government in general is not limited to the executive and legislative branches of government.<sup>41</sup> The same Sienna College poll found that roughly “two-thirds of those polled said the [Supreme Court] Justices’ rulings were based on their political views, not on the Constitution . . .”<sup>42</sup> When public perception of the highest court in the land indicates that it serves as little more than a political mouthpiece coupled with a vocal litany of governmental failures, the future of the regulatory state falls in grave jeopardy. That causation critique includes:

Convulsions like Watergate, the wars in Iraq and Afghanistan . . . income inequality, stagnant wages, [and] environmental degradation . . . Distrust in government has morphed into conspiracy theories, . . . [and] a total lack of faith in the judges and civil servants . . . culminat[ing] in the storming of the Capitol Building on January 6, 2021.<sup>43</sup>

### III. A LACK OF TRUTH, JUSTICE, AND THE AMERICAN WAY<sup>44</sup>

If one embraces the dystopian vision of government as dishonest, untruthful, or worse, it would border on irrational to comply voluntarily with complex regulations or willingly fork over one’s income to a government one believes is corrupt and inefficient.<sup>45</sup> After all, the thinking

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAP., *supra* note 2; Benjamin M. Barczewski, *Politicizing Regulation: Administrative Law, Technocratic Government, and Republican Political Theory*, 100 NEB. L. REV. 424, 428 (2021).

<sup>44</sup> Leah Asmelash, *Superman’s Motto Gets a Modern UIpdate: ‘Truth, Justice and a Better Tomorrow,’* CNN ONLINE ENTERTAINMENT NEWS (Oct. 16, 2021), <https://www.cnn.com/2021/10/16/entertainment/superman-new-motto-dc-fandome-cec/index.html> (Superman flew into American homes for half a century with the motto “Truth, Justice and the American Way.” Even Superman was in need of an update and the term “better” was substituted for American).

<sup>45</sup> Jessie Seaman, *2022 Federal Income Tax Brackets, Rates, & Standard Deductions*, IRS.COM (July 27, 2023), <https://www.irs.com/en/articles/2022-federal-income-tax-brackets-rates-standard-deductions>.



might go: Why should I give up my hard earned dollars to scoundrels who govern so poorly, so dishonestly, so irresponsibly?

Noncompliance, however, is a massive problem. From the Department of Treasury's perspective, the importance of voluntary compliance is unequivocal.<sup>46</sup> In *O'Donnell v. Commissioner of Internal Revenue*,<sup>47</sup> the tax court rejected a settlement offer from a party whose actions reflected a "blatant disregard for voluntary compliance . . . [and found that] accepting the offer would prompt a public reaction that would undermine that goal."<sup>48</sup>

As to the reason for noncompliance, more than anything else, a lack of openness and truthfulness on matters of consequence cuts at the heart of public faith in government.<sup>49</sup> This was never more apparent than public responses during the COVID-19 pandemic. "[T]he more confidence people have in their government in general and in the government's truthful information about the coronavirus outbreak, the more they agree to follow both voluntary and enforced policies . . ."<sup>50</sup> The opposite almost goes without saying. Outright lying or downplaying the pandemic<sup>51</sup> ultimately undercut the government's ability to deal with the disaster.<sup>52</sup>

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<sup>46</sup> Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599, 622-31 (2007) (isolating procedure and belief structure as factors leading to voluntary compliance); Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 996-1008 (2003) (advancing the argument that fair process at the IRS should lead to higher levels of voluntary compliance); Leigh Osofsky, *Some Realism About Responsive Tax Administration*, 66 TAX L. REV. 121, 126-30, 140-43 (2012) (fairness in process may be overrated as a means to securing voluntary compliance).

<sup>47</sup> *O'Donnell v. Comm'r of Internal Revenue*, No. 16881-18L, 2021 WL5578120 (T.C. 2021).

<sup>48</sup> *Id.*

<sup>49</sup> *Gannett Pacific Corp. v. Richardson*, 580 P.2d 49, 55 (1978) (embracing openness in governance as key to public acceptance of government).

<sup>50</sup> Katrin Schmelz, *Enforcement May Crowd Out Voluntary Support for COVID-19 Policies, Especially Where Trust in Government is Weak and in a Liberal Society*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA (Dec. 21, 2020), <https://www.pnas.org/doi/10.1073/pnas.2016385118>.

<sup>51</sup> *Id.*

<sup>52</sup> Christine Chung & Carly Olsen, *The pandemic Has Eroded Americans' Trust in Experts and Elected Leaders Alike, a Survey Finds*, NEW YORK TIMES (July 7, 2022), <https://www.nytimes.com/2022/07/07/us/public-trust-pew-survey.html>.

The pandemic's lessons on the importance of truth are nothing new—but they are troubling and relate directly to willing engagement.<sup>53</sup> Yet, the pandemic is not the most glaring example of the negative effect of suspected dishonesty—that distinction goes to election denialism or the rejection of election results. After all, if one cannot trust the announced outcome of an election, and if they believe the election was a consequence of fraud, deception, and the worst kind of undemocratic manipulation,<sup>54</sup> then the office holder has no real claim to their position and will not carry the respect needed to compel voluntary compliance. That such claims of election fraud are uniformly without merit appears to play no role in the views of tens of millions of people.<sup>55</sup>

One study of this trend concluded as follows: “[A president’s] questioning [of] the integrity of U.S. elections reduces trust and confidence in elections and increases beliefs that elections are rigged . . . These results show how norm violations by political leaders can undermine confidence in the democratic process.”<sup>56</sup> In short, a charge of voter fraud or election manipulation—whether verified or not—inflicts harm on the very capacity to govern. In *Judicial Watch, Inc. v. Griswold*,<sup>57</sup> a federal court in Colorado considered the potential legal harm associated with a challenge to the legitimacy of an election. When the defendants argued that no harm occurred, the court responded: “The individual plaintiffs are not worried

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<sup>53</sup> Schmelz, *supra* note 49 (for COVID-19, forced measures of compliance were met with more resistance and were less successful while voluntary action was met with higher levels of compliance).

<sup>54</sup> Florain Justwan & Ryan D. Williamson, *Trump and Trust: Examining the Relationship between Claims of Fraud and Citizen Attitudes*, CAMBRIDGE UNIV. PRESS (2022) <https://www.cambridge.org/core/journals/ps-political-science-and-politics/article/trump-and-trust-examining-the-relationship-between-claims-of-fraud-and-citizen-attitudes/F315F0F7AC5465D64B755121A0817398>.

<sup>55</sup> Reid J. Epstein, *As Faith Flags in U.S. Government, Many Voters Want to Upend the System*, N.Y. TIMES (July 13, 2022), <https://www.nytimes.com/2022/07/13/us/politics/government-trust-voting-poll.html> (“A majority of American voters across nearly all demographics and ideologies believe their system of government does not work [and] a broad majority of Republicans share [Former President Trump’s] views on the 2020 election....Sixty-one percent said [Trump] was the legitimate winner, and 72 percent described the Jan. 6, 2021, attack on the Capitol as a protest that got out of hand”).

<sup>56</sup> Katherine Clayton, Nicholas T. Davis, Brendan Nyhan, & Thomas J. Wood, *Elite Rhetoric Can Undermine Democratic Norms*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA (June 2, 2021), <https://doi.org/10.1073/pnas.2024125118>.

<sup>57</sup> *Judicial Watch, Inc. v. Griswold*, 554 F. Supp.3d 1091 (D. Colo. 2021).

that their confidence could be undermined at some point in the future; their confidence is undermined now.”<sup>58</sup>

One might take comfort in the belief that election denialism or similar anti-government rhetoric is the domain of fringe or extremist groups—but one would be deluded in that belief. We live in an age of discontent,<sup>59</sup> where trust in government is the exception,<sup>60</sup> not the rule.<sup>61</sup> The absence of trust in government is part of a downward spiral with potentially horrifying consequences, as witnessed on January 6, 2021, when those with great distrust of government stormed the nation’s Capital.<sup>62</sup> Such behavior can only happen when discontent leads to a rejection of the rule of law.<sup>63</sup> Granted, storming the Capitol and causing commotion and destruction is quite different from deciding not to pay one’s taxes, but both actions reflect a mindset that justifies and even encourages noncompliance with norms.

#### IV. VOLUNTARY COMPLIANCE THROUGH THE LENS OF TORT RECONFIGURATION

##### *A. Tort Reform: The Message and Consequence*

After forty years of active tort reform activity and spending millions to convince the public that the system of civil justice is unfair, it is not a stretch to conclude that the public bought into a much broader (and negative)

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<sup>58</sup> *Id.* at 1103-04 (discussing the existence and immediacy of harm stemming from challenges to the efficacy of the process used to conduct an election).

<sup>59</sup> Joseph E. Stiglitz, PEOPLE, POWER, AND PROFITS. PROGRESSIVE CAPITALISM FAR AND AGE OF DISCONTENT, 32-46 (2019); Dionne, E.J. OUR DIVIDED POLITICAL HEART: THE BATTLE FOR THE AMERICAN IDEA IN AN AGE OF DISCONTENT (New York: Bloomsbury 2012); Daniel P. Tokaji, *The Right to Vote in an Age of Discontent*, AM. BAR ASS’N Magazine Online (Jan. 7, 2019).

<sup>60</sup> Leandra Lederman, *Does Enforcement Reduce Voluntary Tax Compliance?*, 2018 BYU L. REV. 623, 653 (2018) (examining the challenges of enforcement in an era of distrust and looking at other countries where a study found that enforcement efforts have higher rates of success when the overall voluntary compliance is already higher).

<sup>61</sup> *Public Trust in Government: 1958-2022*, PEW RESEARCH CENTER (June 6, 2022) <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/>.

<sup>62</sup> Anthony J. Ghiotto, *The Presidential Coup*, 70 BUFFALO L. REV. 369 (2022) (describing the January 6 riot at the Capital and the risks of a presidential coup).

<sup>63</sup> Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 REV. OF LAW AND ECONOMICS 715, 717 (2008) (respect for the rule of law engenders voluntary compliance; rejection of the rule of law makes such compliance unlikely).

conception of government than ever intended.<sup>64</sup> Over that time, many of the specific and targeted goals of tort reform were achieved.<sup>65</sup> Many less specific goals regarding civil liability and accountability had similar successes.<sup>66</sup> From a discontented outsider's viewpoint, the success of that campaign could appear as a generic affirmation of the necessity of an attack on our "outdated and unfair" legal system, particularly when tort reform targets shifted to the whole of the civil process by which tort claims are adjudicated.<sup>67</sup> To many already hearing the whispers of disenchantment from increasingly nasty political campaigns,<sup>68</sup> these actual changes in civil justice and tort law may have been seen as a rallying cry for more change, for different leaders—for "draining the swamp." Couple that with this often-repeated line<sup>69</sup> in the Declaration of Independence: "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . ." <sup>70</sup> and it is a short step to angry discontent and rejection of the fundamental conventions of government.

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<sup>64</sup> David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 903–04 (2015) (footnotes omitted) ("For the past four decades, pro-business interests have spent tens of millions of dollars in an effort to reshape the civil justice system. Under the banner of 'tort reform,' [they] have vilified the civil jury. . . [characterized tort law as] 'jackpot justice' that deters innovation, prompts defensive medicine, and hamstring economic growth . . . [L]egislators, often recipients of largess from deep pocket industries, have succeeded in passing a wide range of laws that curtail plaintiffs' rights...").

<sup>65</sup> Chih-Ming Liang, S.J.D., *Rethinking the Tort Liability System and Patient Safety: From the Conventional Wisdom to Learning from Litigation*, 12 IND. HEALTH L. REV. 327, 344–45 (2015) (regarding problems with frequency of claims); Michelle M. Mello, et al., *The Medical Liability Climate and Prospects for Reform*, 312 (20) JAMA, 2146 (looking at medical malpractice claims).

<sup>66</sup> Gavin, Sandra F., *Stealth Tort Reform*, 42 VAL. U. L. REV. 431 (2008); Christensen, Roland, *Behind the Curtain of Tort Reform*, 16 BYU. L. REV. 261 (2016).

<sup>67</sup> Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 EMORY L.J. 1445 (2016) (discussing the shift in the tort reform quest from substantive tort law to civil process).

<sup>68</sup> Eric Berger, "The Rhetoric of Constitutional Absolutism," 56 WM. & MARY L. REV. 667, 677 (2016) (noting the country's "recent poisonous political atmosphere").

<sup>69</sup> Roman J. Hoyos & Jack M. Balkins, *Who Are "The People,"* 11 ELON L. REV. 23, 76 (2019) (exploring the general right to change government in various settings); Jack M. Balkin & Sanford Levinson, *Symposium: To Alter or Abolish*, 89 S. CAL. L. REV. 399, (2016) (viewing the use and history of the phrase "to alter or abolish").

<sup>70</sup> In Congress, July 4, 1776, "The unanimous Declaration of the thirteen united States of America," July 4, 1776, Para. 2, THE NATIONAL ARCHIVES, <https://www.archives.gov/founding-docs/declaration-transcript>. (this version of the Declaration did not capitalize the "u" in united).

Tort reform, of necessity, required major changes in the legal system and, as with any successful campaign, those changes were achieved through advocacy in multiple settings.<sup>71</sup> The tort reform advocates supported tort-reform- and focused candidates for public office including candidates for judgeships in those states where judges are elected.<sup>72</sup> They intervened or filed amicus briefs in select appellate cases that created the opportunity for a sympathetic view<sup>73</sup> of their needs, and they lobbied the state and federal level with unprecedented intensity, convincing legislators that courts were flooded with frivolous lawsuits.<sup>74</sup> In many ways, they succeeded.

As with campaigns (political and otherwise),<sup>75</sup> some of the stories used were not necessarily true; but it did not seem to matter.<sup>76</sup> For tort reform, that reconstruction of fact appears to have taken place in the infamous McDonald's hot coffee case.<sup>77</sup> The case was bandied about as a stunning example of the existing tort system's wrongfulness because by mocking a victim (even creating an award in her name for the most

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<sup>71</sup> Michael L. Rustad, *The Endless Campaign: How the Tort Reformers Successfully and Incessantly Market Their Groupthink to Rest of Us*, 5 SUFFOLK UNIV. LEGAL STUDIES RESEARCH PAPER NO. 10-32

(2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1614983](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614983) ("In reality, tort reform is an astro-turf movement by public relations professionals representing America's most powerful corporations and insurance companies").

<sup>72</sup> Roederer, *supra* note 25; Stephan D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L REV. 455 (1999).

<sup>73</sup> In one of their most famous initiatives, they went all out in the infamous McDonald's hot coffee case. Alex Mayyasi, *How a Lawsuit Over Hot Coffee Helped Erode the 7th Amendment*, PRICE ECONOMICS (Nov. 18, 2016), <https://priceconomics.com/how-a-lawsuit-over-hot-coffee-helped-erode-the-7th/>.

<sup>74</sup> Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUS. L. REV. 545, 580 (2011) ("In sum, the claim that the federal courts are inundated with 'frivolous' lawsuits is unsubstantiated by the available empirical evidence").

<sup>75</sup> Rebecca Green, *Counterfeit Campaign Speech*, 70 HASTINGS L.J. 1445 (2019); Catherine J. Ross, *Essay: Ministry of Truth: Why Can't Law Stop the Prevarication, Bullshit, and Straight Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367 (2017); Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT L. REV. 53, 72-73 (2013).

<sup>76</sup> Joseph Pierre, *Illusory Truth, Lies, and Political Propaganda: Part 1*, PSYCH TODAY (Jan. 22, 2020), <https://www.psychologytoday.com/us/blog/psych-unseen/202001/illusory-truth-lies-and-political-propaganda-part-1> [<https://perma.cc/W9NP-3W38>] ("Repeat a lie often enough and people will come to believe it").

<sup>77</sup> *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1944 WL 16777704 (D.N.M. Nov. 28, 1994).

outrageous case of the year)<sup>78</sup>, it showed a system in need of change<sup>79</sup> After all, how could someone who spilled coffee on themselves sue and win millions? The truth never gets in the way of a good story, and this was a good story.<sup>80</sup> The fact that Mrs. Liebeck never got anything close to a million dollars was not part of the narrative. The event became a joke and the source for a plot on the television show “Seinfeld.”<sup>81</sup> Mrs. Liebeck’s awful injuries, the hundreds of prior complaints, and the actual course of the litigation did not enter the narrative.

Though there were and are sharp edges in the tort reform wars, tort reformers were and are after a carefully targeted set of changes in the process and substance of civil tort law, not undoing public trust in the government. And yet, it is possible they overshot their target and unwittingly played a role in changing the hearts and minds of the American public.<sup>82</sup>

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<sup>78</sup> The TRUE Stella Awards (June 2020), <http://www.stellaawards.com> (given to the supposedly worst example of the wrongs of the tort system).

<sup>79</sup> Robert A. Adler & Andrew F. Popper, *The Misuse of Product Misuse: Victim Blaming at Its Worst*, 10 WM. & MARY BUS. L. REV. 337 (2019) (discussing the shameful tort reform strategy of blaming consumers for harms); see also David A. Engel, *Perception and Decision at the Threshold of Tort Law: Explaining the Infrequency of Claims*, 62 DEPAUL L. REV. 293, 324-25 (2013) (“reporting of Stella Liebeck’s serious injury followed a distinctive and selective pattern. The media tended to privilege the narrative of litigiousness and personal irresponsibility that the tort reform movement was promoting at that time, with substantial backing from the insurance industry. From initial media reports to subsequent editorials, cartoons, talk shows, and sitcoms, the hot coffee story disseminated by print and electronic media reached millions of Americans and residents of many other countries as well”).

<sup>80</sup> Craig C. Reilly, *The Truth About Lying*, 29 LITIG., Summer 2003, at 40 (“[O]ne would think the “big lie” would no longer work. But the listener’s self-deception will sustain the big lie, even when no proof could convince the rational mind”).

<sup>81</sup> Aimee Lamoureux, *This Seinfeld Coffee Plot Was Based On A Real Lawsuit*, MASHED ONLINE NEWS, (Nov. 21, 2021), <https://www.mashed.com/591145/this-seinfeld-coffee-plot-was-based-on-a-real-lawsuit/> (reporting on and correcting the misimpression of Mrs. Liebeck’s case. “[Mrs. Liebeck] was forced to endure a years-long misinformation campaign in the media and spoofs on television, designed to make her look as though she was simply a greedy customer looking for a payout, rather than an elderly woman seeking compensation after having been seriously injured due to a corporation’s unsafe practices”).

<sup>82</sup> Shapiro & Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA* 52 ADMIN. L. REV. 97,153 (noting that “the danger of tort liability might provide incentives for voluntary compliance....”).

### *B. The Stalemate*

As noted earlier, it is not fair to accuse the architects of tort reform with anything other than trying to change the tort system. Many of their advocates are terrific lawyers and decent people. That fact raises another question—With such fine people on either side of the tort reform war, and with so much at stake, why was there no way to limit what was sought in the tort reform movement? Why keep going at it for four decades? The same question can be asked about the “tribalism” currently associated with the House and Senate and seemingly insinuating itself in all corners of this country.<sup>83</sup>

To be sure, there is real disagreement: Proponents of tort reform continue to argue that meaningful change is essential to the tort system and preservation of fair and balanced civil justice,<sup>84</sup> while those opposed assert that tort reform is about nothing but limiting or eliminating accountability to the detriment of consumers.<sup>85</sup> However, our adversary system is predicated on the hope that from the fire and fury of pointed disagreement, justice will result. Not here.

Courts have recognized that the tort reform debate degenerated into an irresolvable conflict between warring factions. Consider the late Connecticut Supreme Court Justice David M. Shea’s remarks as he attempted to explain the nature of tort reform. Tort reform, he opined, “represents a complex web of interdependent concessions and bargains struck by hostile interest groups and individuals of opposing philosophical positions.”<sup>86</sup> Other characterizations of specific issues in the tort reform

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<sup>83</sup> Seth Davis, *Tribalism and Democracy*, 62 WM. & MARY L. REV. 431 (2020); David Brooks, *The Retreat to Tribalism*, N.Y. TIMES (Jan. 1, 2018)<https://www.nytimes.com/2018/01/01/opinion/the-retreat-to-tribalism.html>; Amy Chua, *The Destructive Dynamics of Political Tribalism*, N.Y. TIMES (Feb. 20, 2018)<https://www.nytimes.com/2018/02/20/opinion/destructive-political-tribalism.html>; see AMY CHUA, POLITICAL TRIBES: GROUP INSTINCT AND THE FATE OF NATIONS 12-13 (2018).

<sup>84</sup> Victor E. Schwartz and Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 TEX. REV. OF L. AND POL. 261 (2000); Richard Abel, *The Real Torts Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1997) (tort law is limited and fails to provide adequate remedies).

<sup>85</sup> Frank McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996); Thomas H. Koenig & Michael L. Rustad, *In Defense of Tort Law* (New York University Press, 2001) at 67 (tort law and its effect on vulnerable and underrepresented populations); Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers, and Consumers*, 48 RUTGERS L. REV. 673, 703 (1996).

<sup>86</sup> *Sanzone v. Board of Police Comm’rs*, 592 A.2d 912, 917 (Conn. 1991).

universe reflect battling more than bargaining.<sup>87</sup> With the tort reform conflict wedged into partisan corners,<sup>88</sup> it seems destined for the infinite abyss of insoluble problems.<sup>89</sup>

Finding meaningful common ground between those supporting tort reform and those opposed becomes an impossible task when the identity of the advocate and the content of the argument are merged.<sup>90</sup> Judges, legislators, and lawyers can slip, knowingly or unknowingly, into party, constituent, or client identity, such that arguments on law and policy become personal threats or outright attacks.<sup>91</sup> Thus, the campaign continues with this troubling and distorted undercurrent: there is something very wrong with the legal system and it must change.

### *C. Goals, Hardlines, and More Noncompliance*

Given mounting discontent, inadvertently fueled by tort reform or otherwise, the chance of a discourse that reflects respect for opposing points of view on governance diminishes. It is extremely difficult to get to issues when ego and individual grievances are front and center. One example of how a fair discourse devolves into a series of unwinnable street fights comes

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<sup>87</sup> Gregory B. Westfall, *The Nature of This Debate: A Look at the Texas Foreign Corporation Venue Rule and a Method for Analyzing the Premises and Promises of Tort Reform*, 26 TEX. TECH L. REV. 903, 925 (1995) (“The tort reform debate really boils down to a simple policy question: Do we favor the interests of business over the interests of those harmed thereby, or vice versa”); Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437, 438 (2007) (“[T]he doctrine of joint and several liability has been a frequent target of tort reform efforts”).

<sup>88</sup> Ashley L. Thompson, *Note: The Unintended Consequences of Tort Reform in Michigan: An Argument for Reinstating Retailer Product Liability*, 42 U. MICH. J.L. REFORM 961, 970 (2009) (characterizing tort reform as deeply partisan).

<sup>89</sup> *E.g.*, Stephen J. Werber, *Ohio Tort Reform in 1998: The War Continues*, 45 CLEV. ST. L. REV. 539 (1997) (characterizing tort reform as a war); Deborah Goldberg, et. al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 509 (2007) (referring to those involved in tort reform adjacent issues as “combatants”).

<sup>90</sup> Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003) (discussing risks involved in over-identification of clients or client interests).

<sup>91</sup> Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 77 (1980) (warning of that circumstance when the lawyer takes on the moral[s or] personality of the client. . .”).



from the Oval Office when then-President Trump<sup>92</sup> demanded loyalty to him over everything else.<sup>93</sup>

President Trump, however, was not breaking new territory with his demand for allegiance or, for that matter, with his personal attacks on various officials.<sup>94</sup> That misconception of role is evident when members of the same party in Congress are on the verge of fistfights about selection of the next Speaker of the House.<sup>95</sup> It is evident when judges impose their personal, political, or ideological perspectives on cases they are supposed to decide based on precedent and existing legal standards.<sup>96</sup> When the opposition becomes the enemy and positions harden, it is impossible to find common ground.<sup>97</sup> In a setting of personal attacks, name-calling, and insults, agreements are few and far between.<sup>98</sup> Sometimes, it seems that the greatest thing a public official can do is to be fomenting, frothing at the mouth, seething with discontent, accusing the “other side” of every

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<sup>92</sup> Helen Hershkoff & Elizabeth M. Schneider, *Constitutional Law in the Trump Era*, 34 CONST. COMMENT. 43 (2019) (discussing President Trump’s race-baiting and personal attacks as well as his sexist proclivities, “Trump campaigned for the White House on a platform of disruption, urging America’s return to a golden time when white men of privilege ruled home and country”).

<sup>93</sup> Michael Kruse, “*I Need Loyalty, To Hear Him Talk, It’s Trump’s Favorite Quality in Other Humans. But It’s Unclear What That Word Means to Him*,” POLITICO (Mar. 2018), <https://www.politico.com/magazine/story/2018/03/06/donald-trump-loyalty-staff-217227/> (“I value loyalty above everything else—more than brains, more than drive and more than energy,” Trump once said”).

<sup>94</sup> Jane Caputi, *Character Assassinations: Hate Messages in Election 2008 Commercial Paraphernalia*, 86 DENV. U. L. REV. 585 (2009).

<sup>95</sup> Brianna Herlihy, *Freedom Caucus Stand Against McCarthy Inspires Conservatives to Fight ‘50 swamps in the 50 states*, FOX NEWS (Jan. 19, 2023), <https://www.foxnews.com/politics/freedom-caucus-stand-against-mccarthy-inspires-conservatives-fight-50-swamps-50-states>.

<sup>96</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); Poppy Noor, *Women’s March Draws Thousands Across US After Roe v. Wade Overturned*, THE GUARDIAN (Jan. 22, 2023), <https://www.theguardian.com/us-news/2023/jan/22/womens-march-2023-roe-v-wade-abortion-rights>.

<sup>97</sup> Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE LAW JOURNAL 1671 (2012) (decrying the ill-manner and vile personal attacks that have become all too frequent in our system of government. “Given the abuse that nominees typically take both during confirmation hearings and after assuming office, it is a wonder that any highly credentialed candidate with a job would agree to become a nominee”).

<sup>98</sup> Leo R. Chavez et al., *Words Hurt: Political Rhetoric, Emotions/Affect, and Psychological Well-Being Among Mexican-Origin Youth*, 228 SOC. SCI. & MED. 240, 241 (2019).

treasonous act they can conjure.<sup>99</sup> When verbal viciousness is commonplace, the hope of a civil discourse, the predicate for problem solving, is gone.<sup>100</sup>

#### V. WEALTH, DAMAGES, AND MORE DISTRUST AND DISCONTENT

Wealth disparity is a source of real and justified discontent.<sup>101</sup> One way to understand anger directed at the legal system is to link allegedly gigantic and undeserved verdicts with the debilitating and shameful wealth disparity that exists—but is it a fair linkage? Excessive damages for noneconomic injury and excessive punitive damages have been a target in the tort reform struggle. The claim is that some clients and lawyers are undeservedly getting huge sums of money.<sup>102</sup> It is not hard to see how that can be extrapolated beyond arguments over excessive noneconomic damages, and understood as evidence of the legal system’s unfairness, a rallying cry for major change. However, nothing, not a single juried empirical study, supports the conclusions that underlie the assertions of unjust enrichment.<sup>103</sup>

The narrative is that these damages<sup>104</sup> destroy vital segments of the economy and weaken the United States’ position in terms of foreign

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<sup>99</sup> Ediberto Román & Ernesto Sagás, *Rhetoric and the Creation of Hysteria*, 107 CORNELL L. REV. ONLINE 188, 189 (2022) (discussing highly charged political rhetoric, including the language of President Trump. “President Trump ...stoked fear by referring to Mexican immigrants as drug dealers, criminals, and rapists, and he garnered an almost cult-like following from his supporters”).

<sup>100</sup> Maritza I. Reyes, *Professional Women Subjugated by Name-Calling and Character Attacks*, 23 J. GENDER RACE & JUST. 397, 400 (2020).

<sup>101</sup> Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581 (2018); Robert Frank, *Income Inequality: Too Big to Ignore*, N.Y. TIMES, Oct. 17, 2010, at BU5 (explaining that wealth and income inequality are primary sources of discontent).

<sup>102</sup> See Stephen Daniels & Joanne Martin, *The Impact That It Has Had Is Between People’s Ears: Tort Reform, Mass Culture, and Plaintiffs’ Lawyers*, 453, 454 (2000) (discussing various criticisms of tort awards following tort reform, including concerns of frivolous lawsuits, inefficiencies, and skyrocketing awards for plaintiffs).

<sup>103</sup> Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007) (tort reformer’s arguments regarding excessive damages, punitive or otherwise, are unsubstantiated).

<sup>104</sup> Henry J. Amoroso & Richard J. Hunter, Jr., *Damages for Pain and Suffering and Emotional Distress in Products Liability Cases Involving Strict Liability and Negligence*, 3 FAULKNER L. REV. 277 (2012) (discussing generally economic and non-economic damages in various tort cases).

competitors.<sup>105</sup> In this narrative, the legal system has run amok,<sup>106</sup> and the standards evolved through that system are unworthy of support (or voluntary compliance). The victims who claim to be harmed in fact suffered no real harm,<sup>107</sup> grossly overstated their losses,<sup>108</sup> and by their own carelessness, caused the harm about which they complain.<sup>109</sup> Not included is the troubling fact that consumer misuse of these arguments amounts to little more than cruel victim blaming.<sup>110</sup> Beyond the technical changes such as abolishing strict liability or joint and several liability, plaintiffs must overcome the messages of tort reform that suggest they are engaged in an illegitimate quest for undeserved profit. This perspective can be devastating. “Some suggested that the plaintiffs should kill themselves while others wished eternal damnation upon them. More resorted to insults and name calling, characterizing the plaintiffs as Satan worshippers.”<sup>111</sup>

These arguments form a foundation for rejection of governmental norms and are predicated on factually unsound ground.<sup>112</sup> And yet, if

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<sup>105</sup> DeVito, *supra* note 25.

<sup>106</sup> Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 LOY. L. REV. 1297, 1302, 1311 (2005) (“Since 1979, there has been a systematic tort reform backlash against punitive damages in all but a few states”).

<sup>107</sup> *Zeier v. Zimmer*, 152 P.3d 861, 869 (Okla. 2006), (discussing unanticipated consequences of tort reform including a windfall for insurance companies).

<sup>108</sup> Daniel J. Capra, *An Accident and a Dream: Problems with the Latest Attack on the Civil Justice System*, 20 PACE L. REV. 339 (2002) (“In sum, tort reform is simply not worth it. [The] case for tort reform is not based on fact. It is simply another part of the onslaught on public opinion, generated by tort reformers, to create a mindset that the tort system is out of control. The attack looks at the costs of the tort system, but not its benefits. It is a carefully crafted attack...”).

<sup>109</sup> Adler & Popper, *supra* note 79.

<sup>110</sup> J. Edgar, *Doctor v. Attorney: Why are Attorneys & Injured Patients Being Blamed for the Rising Costs of Healthcare? Instead of Tort Reform, Why Medical Reform is a Better Solution*, 73 UMKC L. REV. 773 (2005), (finding so-called reforms lessen the amounts insurance companies pay out and thus increases the amount patients must pay for even nominally appropriate health care); T. Trimble, *The Maryland Survey: 1994-1995 Recent Developments The Maryland General Assembly*, 55 MD. L. REV. 893, 907 (1996) (while initially tort reform in some states brought down the cost of health care, in a fairly short time, those rates returned to their pre-tort reform level).

<sup>111</sup> Jayne Ressler, *#WorstPlaintiffsEver: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779, 797 (2017); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOKLYN L. REV. 1, 101–02 (2002)

<sup>112</sup> DeVito, *supra* note 25; Anne Bloom, *The Radiating Effects of Torts*, 62 DEPAUL L. REV. 229, 233–34 (2013) (considering the prospect of tort rulings to influence behavior and transmit normative messages); Lynn A. Baker & Charles Silver, *Introduction: Civil Justice Fact and Fiction*, 80 TEXAS L. REV. 1537, 1541 (2002) (discussing the false

inclined to question the government, these arguments might be all that is needed for a citizen to turn their back on governmentally imposed rules and regulations. When buy-in is lost and when there is public disdain for the norms of civil justice, the systemic damage is very real.

#### VI. BEYOND TORTS AND CIVIL JUSTICE: THE UNCERTAIN FUTURE OF REGULATION IN A NONCOMPLIANCE WORLD

Determining the extent to which public safety is compromised by the decline in voluntary compliance requires a look at both tort law and the regulatory state. What follows is a quick survey of governmental entities causing or affected by broad shifts in voluntary compliance rates.

##### A. *The Consumer Product Safety Commission*

The Consumer Product Safety Commission [hereinafter “CPSC”] does not use enforcement as a primary means to guard the public against products that are dangerous or represent a substantial product hazard.<sup>113</sup> Once a potential hazard is identified, the agency is required by its enabling statute<sup>114</sup> to pursue a negotiated resolution. Lack of faith in government (whether based on misunderstood tort reform messages or long-term grudges and resentments of government) and a misguided belief<sup>115</sup> that most product harms are the result of consumer misuse, undermines the CPSC’s mission.<sup>116</sup> While the CPSC could and does achieve some of its goals through enforcement, doing so on a broad scale is unfeasible in every sense of the term.

Enforcement begins within the agency, but when that fails, moves to federal court where the agency can pursue producers of dangerous products in conjunction with the Department of Justice [hereinafter “DOJ”].<sup>117</sup> These actions are infrequent, as noted in GAO’s report to

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foundation of tort reform); Mark Galanter, *The Turn Against Law*, 81 *Texas L. Rev.* 285, 299-301 (2002).

<sup>113</sup> 15 U.S.C. § 2064(b), 15(b).

<sup>114</sup> 15 U.S.C. § 2056 (b)(1).

<sup>115</sup> Robert A. Adler & Andrew F. Popper, *The Misuse of Product Misuse: Victim Blaming at Its Worst*, 10 *WM. & MARY BUS. L. REV.* 337 (2019) (discussing the shameful tort reform strategy of blaming consumers for harms).

<sup>116</sup> To move to the enforcement level and away from negotiation the product must “contain a defect which could create a substantial product hazard,” or “create an unreasonable risk of serious injury or death.” 15 U.S.C. § 2064(b), 15(b).

<sup>117</sup> *United States v. Black & Decker*, No. 1:15-cv-01239-GLR, 2015 WL 2058980 (D. Md. Apr. 29, 2015) (petition for injunctive relief); *United States v. Gerber Legendary Blades*, 2014 WL 7772152 (D. Or. Dec. 1, 2014) (court order injunctive relief and penalties), <https://www.justice.gov/file/189841/download>; *Galoob Toys, Inc., a*

Congress regarding the CPSC,<sup>118</sup> where DOJ and CPSC jointly must prove the item in question constitutes a substantial product hazard,<sup>119</sup> a difficult standard to meet.<sup>120</sup>

In a typical year, the agency secures hundreds of negotiated compliance agreements, which are best seen as somewhat voluntary since they are compulsory steps once the CPSC determines a product is unsafe. A handful of these result in a “mandatory rule” action, and end in a sanction or recall. “In 2010, CPSC staff completed 427 cooperative recalls” and under 10 enforcement actions and between “2004 and 2007, the agency participated in the creation of 141 voluntary rules and created only three mandatory rules.”<sup>121</sup> Ultimately, resistance to negotiated results possibly borne of tort reform or many other factors<sup>122</sup> is omnipresent. In short, CPSC has a difficult time conducting basics, such as protecting the public from unsafe products and faces uniformly hostile responses to almost anything it does.<sup>123</sup>

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*Corporation, Provisional Acceptance of a Settlement Agreement and Order, A Notice by the Consumer Product Safety Commission, FEDERAL REGISTER, (Sept. 20, 2000)*<https://www.federalregister.gov/documents/2000/09/20/00-24188/galoob-toys-inc-a-corporation-provisional-acceptance-of-a-settlement-agreement-and-order> (Notice of Settlement Agreement).

<sup>118</sup> CONSUMER PRODUCT SAFETY COMMISSION, *A More Active Role in Voluntary Standards Development Should Be Considered, GAO Report to Congress*, May 2012, GAO-12-582, <https://www.gao.gov/assets/gao-12-582.pdf>.

<sup>119</sup> 15 U.S.C. § 2064(a)(1). In order to find that a product presents a “substantial product hazard,” the Commission must first find that a product fails “to comply with an applicable consumer product safety rule . . . which creates a substantial risk of injury to the public.”

<sup>120</sup> CONTACT/FAQ, U.S. Consumer Prod. Safety Comm'n., <https://www.cpsc.gov/About-CPSC/Contact-Information> (last accessed Oct. 12, 2017).

<sup>121</sup> Leslie Cornell, *Product Liability and Internet Prevention: The CPSC Online Consumer Database*, 24 Loy. CONSUMER L. REV. 254, 363-66 (2011).

<sup>122</sup> Roederer, *supra* note 25; F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 470-80 (2006) (setting out the agenda of tort reform, making clear that the goal has little or nothing to do with improving the rights of consumers and everything to do with lessening the accountability of producers); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 721-22 (1998).

<sup>123</sup> Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 WM. & MARY L. REV. 903, 926-38 (1996); Teresa Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121 (1988).

### *B. Food and Drug Administration*

The Food and Drug Administration [hereinafter “FDA”] is focused on safe production and labeling of prescription drugs, certain nonprescription pharmaceuticals, and various food products. It cannot and does not directly police the behaviors of millions of people and thousands of providers. It has limited resources for investigation and enforcement. Achievement of its legislative mandate is supported when there is an active tort/judicial process. “There is good reason to believe that the threat of tort liability assists considerably in effective enforcement of the nation’s drug laws by the FDA, both by encouraging voluntary compliance and by providing leverage for the FDA in informal negotiations.”<sup>124</sup> As tort reform continues to eat away at the civil justice system’s credibility, aided by an expansion of the preemption of tort cases involving pharmaceuticals,<sup>125</sup> the FDA’s task becomes more difficult.

There is also an inherent challenge for the FDA in achieving its goals from an agency fiscal perspective. Most of its contested standard setting or enforcement activities juxtapose limited FDA staff resources against the almost unlimited resources of large pharmaceutical companies<sup>126</sup> with which it tangles – and the mismatch is obvious.<sup>127</sup> Add to that the impact of major Supreme Court preemption decisions that are contradictory, convoluted, and critically important to those adversely affected by pharmaceutical products who want to bring an in-state cause of action in tort.<sup>128</sup> The juridical jumble of contradictory precedent in the preemption field complicates the supportive effect of tort law on achieving the FDA’s delegated mandate.

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<sup>124</sup> Michael D. Green, *Statutory Compliance and Tort Liability: Examining the Strongest Case*, 30 U. MICH. J.L. REFORM 461, 482-83 (1997).

<sup>125</sup> *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019).

<sup>126</sup> Rosie McCall, *Big Pharma Companies Earn More Profits Than Most Other Industries, Study Suggests*, NEWSWEEK (Mar. 4, 2020), <https://www.newsweek.com/big-pharma-companies-profits-industries-study-1490407> (reporting that between 2000 and 2018, Big Pharma had net revenues of just over \$11 trillion).

<sup>127</sup> Michael T. Roberts, *Mandatory Recall Authority: A Sensible and Minimalist Approach to Improving Food Safety*, 59 FOOD & DRUG L J 563, 577 (2004) (proposing that FDA should be given the same authority and directive as the CPSC to secure “voluntary agreements through collaboration and negotiation”).

<sup>128</sup> *Merck Sharp*, 139 S. Ct. at 1668; *PLIVA v. Mensing*, 564 U.S. 604, 613 (2011); *Wyeth v. Levine*, 555 U.S. 555, 571 (2009); Maxwell S. Kennerly, *Merck v. Albrecht: The Supreme Court Eviscerates Preemption in Branded Drug Lawsuits*, LITIG. & TRIAL (May 31, 2019), <https://www.litigationandtrial.com/2019/05/articles/attorney/merck-v-albrecht-impossibility-preemption/> [<https://perma.cc/9AGV-XV89>]; Michael M. Gallagher, *Clear Evidence of Impossibility Preemption After Wyeth v. Levine*, 51 GONZ. L. REV. 439 (2016).

A few simple questions are illustrative. Does FDA approval of the content, use, label, or instructions, *categorically* preempt state tort actions? In a word, no. Are some state tort actions preempted? Yes. Not preempted? Yes. Commenting on the recent *Albrecht*<sup>129</sup> decision, attorney Douglas Smith summed it up nicely: “Albrecht . . . left the door open to a wide variety of potential arguments regarding the nature of agency action (or inaction) sufficient to trigger the preemption defense . . .”<sup>130</sup>

Next, beyond preemption, distrust and dissatisfaction with the FDA, at times stoked by the executive branch,<sup>131</sup> lessened the FDA’s ability to instill confidence generally with both Covid-19 vaccines and treatment. Consider that there was and is nearly one-hundred percent of the polio vaccines over the last half century<sup>132</sup> and compare that with the distrust of the FDA’s assurances regarding these vaccines and treatments from a large segment of the population.<sup>133</sup> One implicit message of various partisan and political ideologies<sup>134</sup> (as well as tort reform rhetoric) is that government is

<sup>129</sup> *In re Fosamax* (Alendronate Sodium) PRODS. LIAB. LITIG., 852 F.3d 268, 285-86 (3d Cir. 2017), vacated, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019).

<sup>130</sup> Douglas C. Smith, *A Shift in the Preemption Landscape?*, 987 TENN. L. REV. 213 (2019).

<sup>131</sup> Stephen Collinson, *Trump, Ever the Salesman, is Peddling Dangerous Cures For Coronavirus*, CNN POLITICS (April 24, 2020), <https://www.cnn.com/2020/04/24/politics/donald-trump-coronavirus-disinfectant-sunlight-science/index.html> (suggesting that injecting or praying a disinfectant could work to prevent or cure Covid-19); Stephen Collinson, Eli Stokols, Noah Bierman, *Trump Touts Unproven Coronavirus Remedies, Drawing a Diplomatic Correction*, L.A. TIMES (Mar. 19, 2020), <https://www.latimes.com/politics/story/2020-03-19/trump-touts-unproven-coronavirus-remedies>.

<sup>132</sup> Susan Brink, *Can’t Help Falling in Love With a Vaccine: How Polio Campaign Beat Vaccine Hesitancy*, HEALTH NEWS FROM NPR (May 3, 2021), <https://www.npr.org/sections/health-shots/2021/05/03/988756973/cant-help-falling-in-love-with-a-vaccine-how-polio-campaign-beat-vaccine-hesitan>.

<sup>133</sup> Derek Thompson, *Millions Are Saying No to the Vaccines. What Are They Thinking?*, THE ATLANTIC (May 3, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/the-people-who-wont-get-the-vaccine/618765/> [https://perma.cc/Q5HS-5SPE]; Diane E. Meier, R. Sean Morrison & Chris Barker, *Covid-19 Vaccine Safety and the Public Trust: Lessons from Paul Meier and Polio*, STAT NEWS (Dec. 7, 2020), <https://www.statnews.com/2020/12/07/covid-19-vaccine-safety-lessons-paul-meier-polio/> [https://perma.cc/A979-ZZKF]; Vinay Prasad (@VPrasadMDMPH) TWITTER (Aug. 30, 2020, 4:25 PM) <https://mobile.twitter.com/VPrasadMDMPH/status/1300182877296979969> [https://perma.cc/6WCN-5DNQ].

<sup>134</sup> *The Dizziness of Freedom: Understanding and Responding to Vaccine Anxieties*, 49 J.L. MED. & ETHICS 580, 580, 585-86 (2021) (“Anti-vaccination ideologists often denigrate scientific studies...while simultaneously craving scientific legitimacy for their theories that vaccines are harmful”).

not to be trusted – and for many people, that message was and is gospel. In this instance, that message may have cost hundreds of thousands of lives.<sup>135</sup>

### C. Department of Justice

The DOJ enforces a broad range of statutes involving voting rights, civil rights, the federal criminal code and more.<sup>136</sup> It also serves as counsel to most federal agencies when a case moves from an agency into federal court.<sup>137</sup> Everything it does is facilitated when there is citizen buy-in to the rights and interests for which DOJ is responsible. Everything is worse when that buy-in is gravely compromised by the plague of negative attitudes discussed in this Article.

It is not particularly controversial to suggest that some of the DOJ's current issues are a result of its own actions. Events between 2017 and 2021 reflect a politicized DOJ that went astray, engaging in “the worst rights violations by the U.S. government in the past 20 years.”<sup>138</sup> One summation from 2021 is enough: “The Department of Justice is a mess. Its morale is low. Its independence is compromised and its integrity suspect.”<sup>139</sup> As harsh as those criticisms are, they are fixed in time. Now, DOJ has new leadership and appears to be on the mend.<sup>140</sup> When a government agency as important

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<sup>135</sup> Derek Thompson, *Millions Are Saying No to the Vaccines. What Are They Thinking? Feelings About the Vaccine Are Intertwined With Feelings About the Pandemic*, THE ATLANTIC (May 3, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/the-people-who-wont-get-the-vaccine/618765/>; Emma Pierson, Jaline Gerardin & Nathaniel Lash, *The Lives Lost to Undervaccination, in Charts*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/interactive/2021/09/14/opinion/states-undervaccination-deaths.html>.

<sup>136</sup> Katherine Hawkins, *The Injustice Department*, POGO (Mar. 17, 2022), <https://www.pogo.org/analysis/2022/03/the-injustice-department> (discussing not just the participation in rights violations but noting the failure of the Department “to prosecute [rights violators or] impose any professional discipline on the attorneys involved, [and seek] dismissal[s] of victims’ civil suits for damages”).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*; Robert N. Weiner, *Fixing the Department of Justice*, 46 ABA HUMAN RIGHTS MAGAZINE ONLINE, No. 3 (Mar. 3, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-next-four-years/fixing-the-department-of-justice](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-next-four-years/fixing-the-department-of-justice) (discussing the failures of DOJ and the difficulty it will have restoring its once stellar reputation); Jessica Huseman & Annie Waldman, *Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government*, PROPUBLICA (Jun. 15, 2017), <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>.

<sup>139</sup> Weiner, *supra* note 137.

<sup>140</sup> Noah Feldman, *The Justice Department Really Needs Merrick Garland; The New AG Will Have to Restore the Department of Justice’s Reputation For Nonpartisan Law Enforcement*, BLOOMBERG NEWS (Jan. 6, 2021),



as the DOJ is perceived as corrupt or biased, public willingness to observe the rules and standards of the regulatory state declines.<sup>141</sup>

The DOJ's creation traces back to the era in which a Reconstructionist Congress enacted transformative legislation.<sup>142</sup> The Department of Justice Act of 1870 entrusted the DOJ with significant enforcement authority, including (1) the power to intervene in any case where the United States has an interest, (2) make rules and regulations governing the Department, and (3) supervise U.S. attorneys, marshals, and clerks.<sup>143</sup> Recently, questions have arisen concerning the DOJ's commitment to enforcement of voting rights, as well as civil rights and their willingness to protect individual liberties.<sup>144</sup> Assuming there is substance to these criticisms, assessing the DOJ's role in negating impulses for voluntary

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<https://www.bloomberg.com/opinion/articles/2021-01-06/attorney-general-merrick-garland-will-have-one-big-priority?leadSource=verify%20wall>.

<sup>141</sup> *Why Political Trust and Voluntary Compliance Have Been Key to Government Pandemic Responsiveness in Europe*, Pub. Affs. Bruxelles (Jan. 16, 2023), <https://www.pubaffairsbruxelles.eu/opinion-analysis/why-political-trust-and-voluntary-compliance-have-been-key-to-government-pandemic-responsiveness-in-europe/>.

<sup>142</sup> See e.g., Jed Hendelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 122 (2014) ("The Department of Justice (DOJ) was created in 1870, after almost a century of disorganization and confusion among the federal government's lawyers").

<sup>143</sup> See ACT TO ESTABLISH THE DEPARTMENT OF JUSTICE, CH. 150, 16 STAT. 162 (1870).

<sup>144</sup> See, e.g., Dhalia Lithwick & Jack Goldsmith, *Politics As Usual: Why the Justice Department Will Never be Apolitical*, SLATE (Mar. 14, 2007), <https://slate.com/news-and-politics/2007/03/why-the-justice-department-will-never-be-apolitical.html> ("The best alternative to radically reconfiguring the Justice Department as a politics-free zone ... is to have confidence in the system we see playing out now ... Let's allow the Congress, the press, and the people to be the check here. This is the genius of a system of checks and balances in the first place: If politics turns out to be the illness here, politics will also prove the cure."); Hans A. von Spakovsky, *FBI and DOJ are Too Politicized, They Must be Stopped*, THE HERITAGE FOUND. (Jun. 22, 2018), <https://www.heritage.org/crime-and-justice/commentary/fbi-and-doj-are-too-politicized-they-must-be-stopped> ("Americans expect the chief law enforcement agencies of the federal government — the DOJ and the FBI — to administer justice in an ethical, professional, objective, nonpartisan and above-board manner. . . Justice demands that they play—and work—by the rules."); Katherine Hawkins, *The Injustice Department*, POGO (Mar. 17, 2022) <https://www.pogo.org/analysis/2022/03/the-injustice-department> ("The Department of Justice was a central participant in two of the worst rights violations by the U.S. government in the past 20 years: the torture of prisoners in government custody after September 11, and the forcible separation of parents and children at the Mexico-U.S. border in 2017 and 2018. When those policies ended, DOJ failed to prosecute their architects...").

compliance is a fairly short step.<sup>145</sup> Recent criticism is deeply troubling; there is a basis to believe that the White House used the DOJ to carry out partisan missions and undermine or attack those disfavored by the White House.<sup>146</sup> Those actions help explain one of the themes of this Article: Why play by the rules when those in the highest offices of government fail to do so?

In any case, it would be stretching reality to assume that the DOJ's reputation as an austere, independent, and apolitical institution, is intact. It is not. That alone is enough for some to conclude that the government generally and federal agencies, in particular, are corrupt institutions.<sup>147</sup> If that is true, it also explains the hesitation of why one would voluntarily follow their mandates.

#### *D. Department of Labor*

The Department of Labor [hereinafter "DOL"] was established to "foster, promote[,] and develop the welfare of working people."<sup>148</sup> From its inception, the DOL has been committed to workplace safety and workers'

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<sup>145</sup> Weiner, *supra* note 137 ("The Department of Justice is a mess. Its morale is low. Its independence is compromised. And its integrity is suspect. The cleanup will be hard... the department should revitalize its Civil Rights Division, which has been hollowed out during the Trump administration. Civil rights enforcement should once again be a priority..."); Jessica Huseman & Annie Waldman, *Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government*, PROPUBLICA (Jun. 15, 2017), <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>.

<sup>146</sup> Patrick E. Longan & James P. Fleissner, *Partisanship and the Attorney General of the United States: Timely Lessons from Edward Levi and Griffin Bell about Repairing a Politicized Department of Justice*, 72 MERCER L. REV. 731, 740 (2021) (discussing the "use of the powers of the Office of the Attorney General for improper purposes such as to enhance or harm the political prospects of friends or foes or to administer the laws differently for people or institutions that are favored or disfavored by the President ... The use of the powers of office for such partisan or personal purposes is what it means for the Department of Justice to be 'politicized.' Such activities are abuses of power").

<sup>147</sup> *Press Release, U.S. Representative Jerry Nadler, Chairman Nadler Statement on DOJ's Decision to Drop Criminal Charges Against Michael Flynn* (May 7, 2020), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394274>. (Press release from Judiciary Chair Nadler labeling the DOJ as thoroughly corrupt in stewarding the pardons of Michael Flynn and Roger Stone).

<sup>148</sup> Judson MacLaury, *A Brief History: The U.S. Department of Labor*, DEP'T OF LABOR, <https://www.dol.gov/general/aboutdol/history/dolhistoxford#:~:text=The%20organic%20act%20establishing%20the,before%20Woodrow%20Wilson%20took%20office.>

rights.<sup>149</sup> In its early years, cases like *Lochner* compromised<sup>150</sup> that mission by limiting or eliminating the DOL's reach.<sup>151</sup> Most of those hurdles were cleared, making way for New Deal legislation,<sup>152</sup> particularly the Fair Labor Standards Act of 1938.<sup>153</sup> For the next four decades, the DOL continued its mission regarding the rights and safety of workers. In 1982, DOL created a Voluntary Protection Program with OSHA.<sup>154</sup> The public partnership needed for compliance was short-lived. Discontent with government increased in the end of the twentieth century, voluntary compliance decreased, and the agency was forced to implement an enforcement--based approach.<sup>155</sup> Like many federal agencies, despite its efforts in the best interest of workers, public attitudes toward the DOL dropped significantly.<sup>156</sup> The DOL's efforts to champion workplace rights and safety has been forgotten in the haze of anti-government rhetoric and anti-agency and union animus. President Ronald Reagan's promise to fire any worker in any government agency who went on strike best expressed this animus.<sup>157</sup> And over time, public support of unions and public acceptance of DOL mandates lessened dramatically.<sup>158</sup>

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<sup>149</sup> See *id.* (clarifying that the Department of Labor in 1913 was comprised of the U.S. Conciliation Service, Bureau of Labor Statistics, Bureau of Immigration, and Bureau of Naturalization, and the Children's bureau).

<sup>150</sup> See *Lochner*, 198 U.S. at 53 (determining that freedom to contract was protected under the due process clause of the Fifth Amendment).

<sup>151</sup> The *Lochner* Era is generally referring to 1905 through the middle of the 1930s when the Supreme Court invalidated over 200 regulations regarding taxes, labor, and pricing. Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 610 (1996).

<sup>152</sup> Judson MacLaury, *A Brief History: The U.S. Department of Labor*, DEP'T OF LABOR, <https://www.dol.gov/general/aboutdol/history/dolhistoxford#:~:text=The%20organic%20act%20establishing%20the,before%20Woodrow%20Wilson%20took%20office.>

<sup>153</sup> 29 U.S.C. § 201 *et seq.*

<sup>154</sup> *OSHA Voluntary Protection Programs: All About VPP*, U.S. DEP'T OF LABOR OFF. OF FED. CONT. COMPLIANCE PROGRAMS (last visited Feb. 5, 2023), [https://www.osha.gov/dosp/vpp/all\\_about\\_vpp.html](https://www.osha.gov/dosp/vpp/all_about_vpp.html).

<sup>155</sup> The practice is a change from the Trump administration's support for the program. See Jane Farrell, *The Promise of Executive Order 11246: "Equality as a Fact and Equality as a Result"*, 13 DEPAUL J. SOC. JUST. 1, 22 (2020) (noting the motivation behind the program was to get employees their owed wages without going through litigation and encourage employee accountability).

<sup>156</sup> J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1178 (2012) (assessing DOL actions, labeling some regulatory failures).

<sup>157</sup> *PATCO v. Fed. Lab. Relations Auth.*, 685 F.2d 547, 556-75 (D.C. Cir. 1982).

<sup>158</sup> Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 764 (1983).

### *E. Securities and Exchange Commission*

Congress created the Securities and Exchange Commission [hereinafter “SEC”] in response to the worst financial crisis of the twentieth century, the Great Depression. The Securities Exchange Act of 1934 authorized creation of the Securities and Exchange Commission.<sup>159</sup> To achieve these goals, public buy-in was and is required, and voluntary compliance imperative. The same is true for the SEC’s work implementing the Sarbanes-Oxley Act and the Dodd Frank Act,<sup>160</sup>— passed in the shadows of the accounting scandals of the early 2000’s and the 2007–2009 financial crisis. Following that legislation, the SEC added reporting requirements—and they were almost immediately criticized by major corporations including Amazon Inc. and Walmart<sup>161</sup> for increasing the time and cost of various filings with the SEC. The SEC defended its actions by highlighting that the statutes required the SEC to take these actions.<sup>162</sup> The tense relationship between the SEC and those subject to its regulation continues today. A particular source of controversy is the climate-affecting reporting requirements.<sup>163</sup> In recent years, by declaring unlawful the mode of appointment and removal of the SEC Administrative Law Judges, the Supreme Court added to the fractious relationship between the agency and the public.<sup>164</sup>

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<sup>159</sup> Eva Su, CONG. RSCH. SERV., IF11256, *SEC Securities Disclosure: Background and Policy Issues* (2019).

<sup>160</sup> *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) (discussing the necessity of presidential appointment and “for cause” removal of PCAOC Board members); Gary Shorter, CONG. RSCH. SERV., IF11714, *Introduction to Financial Services: The Securities and Exchange Commission* (SEC) (2023).

<sup>161</sup> Jean Eaglesham & Paul Kiernan, *SEC Considers Easing Climate-Disclosure Rules*, THE WALL STREET JOURNAL (Feb. 3, 2023), <https://www.wsj.com/articles/sec-considers-easing-climate-disclosure-rules-after-investor-pushback-11675416111> (“Three-quarters of Americans say that their fellow citizens’ trust in the federal government has been shrinking...”).

<sup>162</sup> Lee Rainie & Andrew Perrin, *Key Findings About Americans’ Declining Trust in Government and Each Other*, PEW RESEARCH FOUNDATION PAPER (July 2019), <https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/>.

<sup>163</sup> Sung Hui Kim, *Insider Trading As Private Corruption*, 61 UCLA L. REV. 928, 945 (2014) (noting this purpose but also the reality that there is no consensus on the “very purpose” of securities regulation).

<sup>164</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2044 (2018).

*F. The Bent but Not Broken: Federal Regulation*

Distrust in the institutions<sup>165</sup> established to secure trust and confidence in financial markets (SEC) or protect the public health and wellbeing (CPSC, FDA, and DOL), has become a potent impediment undermining the laudable goals those agencies were charged to pursue.<sup>166</sup> At this point, the very structure and position of governance by agencies is the source of criticism. Typical of the structural attack is the following perspective:

The agencies ... [were] not contemplated by the Constitution, [are] run by officials who do not answer to voters . . . Americans spend much time and energy arguing over who should be elected to Congress or sent to the White House, [when] laws that govern citizens' lives are written not by elected officials but by bureaucrats ... shielded against the democratic process.<sup>167</sup>

This complaint is technically incorrect—Congress writes laws and agencies write rules to implement those laws.<sup>168</sup>

Nevertheless, attacking agencies as dominions of unbridled discretion<sup>169</sup> is part of the broad-based criticism of government that provides many with their justification for noncompliance. For each agency

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<sup>165</sup> Gerard Robinson & Maury Giles, *America Divided: Why It's Dangerous That Public Distrust in Civic Institutions is Growing*, USA TODAY (Mar. 15, 2021), <https://www.usatoday.com/story/opinion/2021/03/15/why-americans-growing-distrust-civic-institutions-warning-column/4668616001/>.

<sup>166</sup> Fraud On the Rise, SEC Public Note (Dec. 13, 2022), <https://www.sec.gov/page/fraud-rise>; Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 HARV. L. REV. 1067 (2019); Michael Kelly, Douglas Paul, & Sarah Wang, *SEC's 2019 Enforcement Report Suggests Rise in Accounting Fraud Investigations in 2020*, BLOOMBERG NEWS: INSIGHT (Dec. 3, 2019), <https://news.bloomberglaw.com/securities-law/insight-secs-2019-enforcement-report-suggests-rise-in-accounting-fraud-investigations-in-2020>.

<sup>167</sup> Timothy Sandefur, *THE PERMISSIONS SOCIETY: HOW THE RULING CLASS TURNS OUR FREEDOMS INTO PRIVILEGES AND WHAT WE CAN DO ABOUT IT* 34 (Encounter Books 2016).

<sup>168</sup> Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 308 (2017) (defending the ability of agencies to write rules that implement their delegated authority).

<sup>169</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (warning about the pox of unbridled discretion); Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 677 (2016) (noting the country's "recent poisonous political atmosphere...").

highlighted above, negative public perception is a significant factor in distrust and has morphed into mistrust, anger, and in some instances, armed protest.<sup>170</sup>

Twenty years ago, Professor Richard Parker noted that “[a]lthough regulatory skepticism is by no means new, the recent wave of regulatory skepticism is distinct from earlier attitudes.”<sup>171</sup> Instead of fostering appreciation for their protective pursuits, there is “a hostile climate for all proposed new measures to protect public health, safety, and the environment . . .”<sup>172</sup>

This Article mentions various reasons for discontent. Affirmation for distrust is provided by many sources including “industry supported negative characterizations [of federal agencies], almost all without verification, aided by vicious political campaign rhetoric [producing] a stream of well-publicized ‘horror stories’ of government zealotry and caprice . . .”<sup>173</sup> Governing with public support has always been a challenge—but governing a populace increasingly hostile to regulation is a gargantuan and potentially insurmountable task.

## VII. RESISTANCE TO THE RESTORATION OF TRUST

### A. *The Mask Debacle*

Although rates of voluntary compliance vary considerably, the probability of compliance can be greatly affected by personal political considerations. One example of this phenomenon is whether it was “more effective to persuade, as opposed to mandate, people to wear masks” during the COVID-19 pandemic.<sup>174</sup>

Some agencies determined that they would have better results utilizing a voluntary compliance program rather than a mask mandate.<sup>175</sup> To

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<sup>170</sup> Mike Levine, *How a Standoff in Nevada Years Ago Set the Militia Movement on a Crash Course With the US Capitol, Homegrown: Standoff to Rebellion*, ABC NEWS (Jan. 5, 2022), <https://abcnews.go.com/US/standoff-nevada-years-ago-set-militia-movement-crash/story?id=82051940>.

<sup>171</sup> Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1347 (2003).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Stephanie Cooper Blum, *Federalism: Fault or Feature—An Analysis of Whether the United States Should Implement a Federal Pandemic Statute*, 60 WASHBURN L.J. 1, 42-43 (2020).

<sup>175</sup> *Mass. Bldg. Trades Council v. United States DOL (In re MCP No. 165)*, 21 F.4th 357 (6th Cir. 2021) (endorsing the use of masks and relying on voluntary compliance:

effectuate long-term change, “effective messaging, education, and voluntary compliance can modify behavior.”<sup>176</sup> In contrast, a mandate is effective only as long as it is enforced.

Despite directives from the FDA and the CDC to the contrary, in April 2020, President Trump announced he would not wear a mask and criticized those who did.<sup>177</sup> Trump’s decision illustrates the politicization of mask wearing. This politicization resulted in a “20-point split between Republicans and Democratic mask usage, with Republicans substantially less likely to wear them consistently.”<sup>178</sup> Partisan politics was central to the probability of voluntary mask compliance, but as discussed, it is by no means the only source of discontent.

### *B. Command and Control Illusions*

Assuming partisan or personal politics result in resistance to voluntary compliance, is command and control regulation a better approach? Not necessarily. Professor Cass Sunstein, a luminary in this field, suggested that command and control regulation was not the right approach in a number of areas, particularly with environmental regulation.<sup>179</sup> “By the late 1970’s, [many observed that] command-and-control regulation had experienced regulatory failure . . .”<sup>180</sup> By the late 1990s, there was general acceptance of Professor Sunstein’s critique and an endorsement of voluntary compliance as an “incentive -based . . . system . . . [a] superior approach

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“As early as April 2020, OSHA sought to protect workers through “widespread voluntary compliance” with “safety guidelines,”...and by reinforcing employers’ “general duty” to furnish each worker “employment and a [safe]place of employment...”).

<sup>176</sup> Blum, *supra* note 173, at 43.

<sup>177</sup> Dareh Gregorian, *Trump Says ‘I don’t agree’ With CDC Director’s Mask Message*, NBC ONLINE NEWS (July 17, 2020), <https://www.nbcnews.com/politics/donald-trump/trump-says-i-don-t-agree-cdc-director-s-mask-n1234253>.

<sup>178</sup> Josh Katz, Margot Sanger-Katz & Kevin Quealy, *A Detailed Map of Who Is Wearing Masks in the U.S.*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/interactive/2020/07/17/upshot/coronavirus-face-mask-map.html> [<https://perma.cc/6WZT-LR5W>].

<sup>179</sup> Cass Sunstein, *Administrative Substance*, 40 DUKE L.J. 607, 627 (1991) (citing failures in using “rigid, highly bureaucratized ‘command-and-control’ regulation”).

<sup>180</sup> Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) the Contract with American: Improving Environmental Policy or Destroying Environmental Protection?* 5 KAN. J.L. & PUB. POL’Y 9, 13-14 (1996).

because [it] harness[es] the power of the market . . .”<sup>181</sup> As noted, however, if there was a window in the end of the twentieth century for voluntary compliance, it was open only a brief time.

Command and control regulation is not a complete failure, but it is not a viable long-term strategy. When market participants are unwilling to comply voluntarily, the government must either give up on a stated legislative goal or initiate enforcement actions. Regulatory programs by enforcement become a continuous and costly obligation. Moreover, a culture of enforcement fosters opposition to government in general. It is fair to say “no one likes to be told what to do”<sup>182</sup> and that is exactly how command and control is seen. In contrast, when the public is left to its impulses to comply with regulation, and not given such strict guidelines, the possibility of progress or innovation increases.<sup>183</sup> Reaching a point where regulators and regulation are not seen as a negative force may be unfeasible, but giving up on the goals of regulation is not an option. Public safety, civil rights, fairness, and a host of other virtues are part of our heritage and must be part of our future.

### *C. Truthfulness and the Restoration of Trust*

A simple predicate for respect is truthfulness. But in recent years, blindly relying on the government’s truthfulness became dangerous.<sup>184</sup> Even science, the natural domain of truth and verification, was suddenly suspect.<sup>185</sup> In one interview, President Trump admitted that he lied about what he knew to be the actual risks of COVID-19.<sup>186</sup> His approach

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<sup>181</sup> *Sackett v. United States*, 566 U.S. 120 (2012) (complainants had standing to challenge ... an enforcement policy that consisted of heavy-handed threats that allegedly exacted considerable costs on the complainant).

<sup>182</sup> Autumn R. Triplett, *The Right to Rainwater: An Unlikely Fairy Tale*, 69 *MERCER L. REV.* 575, 603 (2018).

<sup>183</sup> Henk van de Bunt & Wim Huisman, *Organizational Crime in the Netherlands*, 35 *CRIME & JUST.* 217 (2007) (“the companies with high levels of compliance chose to comply because they recognized the long-term costs of noncompliance...”).

<sup>184</sup> Stephen Collinson, *Trump, Ever the Salesman, is Peddling Dangerous Cures for Coronavirus*, CNN *POLITICS* (Apr. 24, 2020), <https://www.cnn.com/2020/04/24/politics/donald-trump-coronavirus-disinfectant-sunlight-science/index.html> (suggesting that injecting or praying a disinfectant could work to prevent or cure Covid-19).

<sup>185</sup> Katz, *supra* note 177.

<sup>186</sup> Ryan Grenoble, *Trump Admits He Lied About COVID-19*, HUFFPOST (Sept. 20, 2020), [https://www.huffpost.com/entry/trump-coronavirus-bob-woodward\\_n\\_5f58fd32c5b6b48507fab99](https://www.huffpost.com/entry/trump-coronavirus-bob-woodward_n_5f58fd32c5b6b48507fab99) (Subtitle: *While Trump said publicly it would*



reaffirmed what appears to be massive distrust in government. He compounded that distrust by calling those who disagreed with him on topics like comprehensive deregulation stupid, treasonous, disloyal, and dishonest.<sup>187</sup> Rhetoric at that level puts our democracy on the fast track to demise and makes renewed faith in government a distant hope.<sup>188</sup> Still, notwithstanding attacks from presidents and political officials, mistakes, and occasional poor decisions, faith can be restored.<sup>189</sup> Perhaps, even faith in our electoral process can be saved.<sup>190</sup> Truth, transparency, fairness, and proper process in all respects are the starting points.

There is no on or off switch to restore confidence, particularly when unrelenting political warfare is dominant. When a national election is characterized as stolen, meaning the most fundamental and vital exercise of democracy is corrupted, restoration of faith is going to take a long time.<sup>191</sup> Still, our best hopes remain, that we will again be that “shining city on the hill . . .”<sup>192</sup>

#### VIII. CONCLUSION

If most Americans believe that those who govern are unfair, corrupt, and stupid, as they were once told by a chief executive of this country, it stands to reason that the majority of the American public will neither respect

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*“just disappear,” he told journalist Bob Woodward that he knew the coronavirus was “deadly stuff but: “I wanted to always play it down,” Trump told Woodward...”*

<sup>187</sup> Kevin Quealy, *The Complete List of Trump’s Twitter Insults* (2015-2021), N.Y. TIMES (Jan. 19, 2021), <https://www.nytimes.com/interactive/2021/01/19/upshot/trump-complete-insult-list.html#>.

<sup>188</sup> *United States v. MyLife.Com, Inc.*, 567 F. Supp. 3d 1152, 1156 (2021) (on restoring consumer confidence in online services referring, *inter alia* to the Restore Online Shoppers’ Confidence Act (ROSCA), 15 U.S.C.S. § 8403).

<sup>189</sup> *Airlines for Am. v. City & Cnty. of San Francisco*, 21-cv-02341-EMC LEXIS 63466 (N.D. Cal. Apr. 5, 2022) (restoring faith in the safety of air travel in the course of the pandemic).

<sup>190</sup> *Lam v. State*, 2022 Haw. LEXIS \*147, (Haw. Aug. 29, 2022); *Lam v. State Supreme Court of Hawai’i* 2022 Haw. LEXIS \*167 (Haw. Sept. 16, 2022).

<sup>191</sup> Jiffer Bourguignon & Ekaterina Sprenger, *Restoring Public Trust After Trump and COVID-19*, Nat’l Inst. of Health, (2021), <https://pubmed.ncbi.nlm.nih.gov/33518781/>.

<sup>192</sup> David Frum, *Is America Still the ‘Shining City on a Hill?’*, THE ATLANTIC (Jan. 1, 2021) (quoting from Farewell Address of President Ronald Reagan, January 11, 1989: “I’ve spoken of the shining city all my political life...in my mind it was a tall, proud city built on rocks stronger than oceans...open to anyone with the will and the heart to get here”).

nor follow government mandates.<sup>193</sup> Strident opposition to the point of armed conflict is now part of our unsocial order.<sup>194</sup>

Examples of the American's rejection of government are not hard to find. Obvious examples include the recent violence seen on January 6th,<sup>195</sup> and a losing candidate's mission to shoot members of the opposing party.<sup>196</sup> Even when the public is aware that regulations or judicial decisions are designed to protect them, discontent and anger with government can override rational behavior.<sup>197</sup> For example, the number of firearms seized in airport searches is at an all-time high,<sup>198</sup> even though people flying on commercial airlines understand they will be searched before they board a

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<sup>193</sup> Matt Stevens, *Falling Trust in Government Makes It Harder to Solve Problems, Americans Say*, NEW YORK TIMES (Jul. 22, 2019),

<https://www.nytimes.com/2019/07/22/us/politics/pew-trust-distrust-survey.html>.

<sup>194</sup> Karolina Rivas, *Trump Pardons Oregon Cattle Ranchers at the Center of Bundy Standoff*, ABC ONLINE NEWS (Jul. 10, 201), (<https://abcnews.go.com/Politics/trump-pardons-oregon-cattle-ranchers-center-bundy-standoff/story?id=56487437>) (“The ranchers' 2016 sentencing resulted in a 41-day standoff led by Ammon Bundy”. . . the crimes with which members of the Bundy family were charged include arson in 2012 and an armed standoff with federal agents in 2014, and in 2018, President Trump pardoned those offenses).

<sup>195</sup> SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE UNITED STATES CAPITOL, *supra* note 2.

<sup>196</sup> Amy Gardner & Dan Rosenzweig-Ziff, *New Details Emerge About Plot to Shoot at New Mexico Democrats' Homes*, WASHINGTON POST (Jan. 17, 2023), <https://www.washingtonpost.com/politics/2023/01/17/solomon-pea-shooting-new-mexico/>.

<sup>197</sup> Joseph E. Stiglitz, PEOPLE, POWER, AND PROFITS. PROGRESSIVE CAPITALISM FAR AND AGE OF DISCONTENT, 32-46 (2019); Dionne, E.J. OUR DIVIDED POLITICAL HEART: THE BATTLE FOR THE AMERICAN IDEA IN AN AGE OF DISCONTENT (New York: Bloomsbury 2012); Daniel P. Tokaji, *The Right to Vote in an Age of Discontent*, AM. BAR ASSN (Jan. 7, 2019),

[https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/we-the-people/right-to-vote-in-age-of-discontent/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/we-the-people/right-to-vote-in-age-of-discontent/) [<https://perma.cc/JV3Y-GZAJ>]. *Public Trust in Government: 1958-2022*, PEW RESEARCH CENTER (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/>.

<sup>198</sup> Nicole Sganga & Kathryn Krupnik, *TSA Confiscated Record Number of Guns From Airline Passengers in 2022*, (Jan.17, 2023), <https://www.cbsnews.com/news/tsa-guns-2022/> (“Transportation Security Administration officers confiscated more than 6,542 firearms from airport passengers in 2022 — the highest number recorded since the agency's inception. Of those guns taken at airport security checkpoints, and 88% were loaded...”).

flight. Fights between passengers and attacks on flight attendants further reflect troubling trends in airline travel.<sup>199</sup>

Perhaps to monger fear or underscore how serious they are, some politicians speak openly of the possibility of another Civil War.<sup>200</sup> At times what divides us seems unassailable— but civil war?<sup>201</sup> First, nothing about war is civil. Second, those who make such threats might choose their words more carefully if they had actually been to war.<sup>202</sup> Third, it is difficult to identify issues worth killing another. Caps on punitive damages? Rules on air and water quality? Prohibition of insider trading? Disputes on the methodology used to count votes? The content of a social studies textbook? Perceived intrusive regulation regarding the use of swamps for commercial construction?<sup>203</sup> These are not unimportant—but killing fellow citizens based on disagreements over such issues is criminal and would signal the death knell of this Republic.

Those who espouse such anti-government sentiment ought to ask themselves the following: When the greatest needs arise, when a hurricane devastates Florida, Louisiana, Texas, or New Jersey, when the Gulf of Mexico's surface becomes a fire hazard, when our transportation infrastructure begins to fail, when the air we breathe is toxic and the food

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<sup>199</sup> Marnie Hunter, *FAA Numbers Confirm It – 2021 Was Terrible for Bad Behavior in the Skies*, CNN ONLINE NEWS (Jan. 13, 2022),

<https://www.cnn.com/travel/article/unruly-airline-passengers-faa-2021/index.html>.

<sup>200</sup> William G. Gale & Darrell M. West, *Is the US Headed for Another Civil War?* BROOKINGS INSTITUTE SERIES: *The Strengthening American Democracy Initiative* (Sept. 16, 2021), <https://www.brookings.edu/blog/fixgov/2021/09/16/is-the-us-headed-for-another-civil-war/>.

<sup>201</sup> Julie Harte, *Trump Tweet, Political Divisions Fuel Rising Discourse about new U.S. Civil War*, REUTERS (Oct. 29, 2019), <https://www.reuters.com/article/us-usa-civil-war/trump-tweet-political-divisions-fuel-rising-discourse-about-new-u-s-civil-war-idUSKBN1X812B>, archived at <https://perma.cc/LW8S-2RHW> ("Georgetown University's Institute of Politics and Public Service this month released a poll that found ... the average voter believes the United States is two-thirds of the way to the edge of a civil war."); Mary B. McCord, *Armed Militias Are Taking Trump's Civil War Tweets Seriously*, LAWFARE (Oct. 2, 2019), <https://www.lawfareblog.com/armed-militias-are-taking-trumps-civil-war-tweets-seriously>, archived at <https://perma.cc/6DML-WEKM>.

<sup>202</sup> Author's note: I am a combat veteran and deeply troubled by those threatening civil war, particularly those who never have been in combat, who have no idea of the otherworldly mayhem war entails. Though we disagree, I greatly respect my colleagues on the other side of the tort reform debate. They have a clear and understandable point of view. I cannot say the same for those who threaten to incite a conflict they can neither understand nor control.

<sup>203</sup> Josh Guckert, *Top 10 Government Agencies We Should Eliminate Immediately*, THE LIBERTARIAN REPUBLIC, (Apr. 7, 2015), <https://thelibertarianrepublic.com/top-10-government-agencies-we-should-eliminate-immediately/>.

we eat makes us sick, when massive securities fraud wipes out the 401(k)s of retirees, when a pandemic leaves over a million dead, when the World Trade Center is destroyed in the worst foreign terrorist incident in our history, when communicable diseases threaten the health of all, when domestic terrorists strike and thousands are killed in our heartland, “[W]ho you gonna call?”<sup>204</sup> It’s safe to say the answer is our local, state, and federal government—not a militia group somewhere in the interior of this country. We the people—all of us—rely on our government for our wellbeing. We rely on our laws and regulations to give us a fair shot at health and prosperity.

We may disagree completely on decisions made or policies followed, but who among us wants war within our borders, a full constitutional rewrite, changing the very nature of democracy, empowering a president with summary control and power over all aspects of life?<sup>205</sup> Negativism, criticism, challenge, and arguments have their place in every government. And in the United States, the right to think and speak in those hostile tones is one protected by the very Constitution some are ready to defile.

Our greatest achievements in times of war and peace were not secured by anarchy or violent upheaval. Government, in all its forms and with all its endless variation in attitude and political values, is what makes this republic—and governance without some meaningful level of public acceptance of those institutions cannot last. The best measure of that acceptance is the extent to which people comply voluntarily, not through enforcement or force. To participate, even when one finds fault with many or all aspects of government, is to have ownership of government, and that guarantees continuity.

If you have read this far, you may well be asking whether there is a solution to any, some, or all the issues generated by discontent. Perhaps something from Congress? Not likely. The courts? Probably not. The White House? Not under these circumstances. The agencies? Beleaguered agencies are probably not going to be the force to turn things around. So, who is left?

We are. We lawyers and those thousands of law students about to enter this learned and vitally important profession. It is up to us to take

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<sup>204</sup> *Ghostbusters*, written and directed by Ivan Reitman, Dan Aykroyd and Harold Ramis, <https://www.imdb.com/title/tt0087332/>.

<sup>205</sup> Julian G. Ku, *Symposium: Presidential Power In Historical Perspective: Reflections on Calabresi and Yoo's the Unitary Executive: Unitary Executive Theory and Exclusive Presidential Powers*, 12 U. PA. J. CONST. L. 61 (2010) (exploring oddly expanded vision of presidential power).

notice of all the diverse perspectives of those we represent and then, respectfully, rise above the expletives, invectives, and shouting, above the finger pointing and demeaning, and do our jobs.

Find the just and best arguments, demand a fair, objective, and constitutionally proper forum, whether in a hearing before a small-town justice of the peace or in the great stone courthouses throughout this country. Whether practicing in government, private sector, public interest, working in or for a political entity demonstrate faith in the legal system.

Proceed with dignity and respect. Set an example by making clear that justice is nonpartisan. Live by your oath to respect our laws and that includes our regulatory standards. Rise above the fray, be the solid voice of reason and of the many and varied approaches to justice.

There are more than one million lawyers in this country.<sup>206</sup> We can be the unflinching source of reason and fairness without compromising a scintilla of client interest. Be the guardian, the steward of our democracy. Be that great lawyer you wrote about in your application to law school.<sup>207</sup> Recommit to those ideals, stand up for those ideas, and do so in every setting where you can be seen and heard. Use that strength, compassion, decency, and grace you possess and let the world know that is what we stand for, as the voices of this legal system.<sup>208</sup>

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<sup>206</sup> *ABA Survey Finds 1.3M lawyers in the U.S.*, ABA JOURNAL ONLINE, June 22, 2022, <https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/aba-lawyers-survey/>.

<sup>207</sup> Final author's note: For more than 30 years, I have been a member of or chaired the committee on admissions at American University Washington College of Law and I have read many thousands of personal statements and essays. I know from whence I speak – we lawyers can make a difference.

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