
**BELLING THE PARTISAN CATS: PRELIMINARY
THOUGHTS ON IDENTIFYING AND MENDING A
DYSFUNCTIONAL CONSTITUTIONAL ORDER**

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INTRODUCTION

Proponents of constitutional reform in the United States maintain that constitutional change must be initiated from outside the regular channels of constitutional politics.¹ In his book, *Our Undemocratic Constitution*, Professor Sandy Levinson, the most prominent champion of constitutional revision or replacement,² first argues that certain provisions in the U.S. Constitution prevent governing officials from making coherent policies that are responsive

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¹ See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 23-24 (2006) (discussing the inability to achieve needed constitutional reforms through textually defined mechanisms, and how this inability creates a necessity for external reforms); LARRY J. SABATO, *A MORE PERFECT CONSTITUTION: IDEAS TO INSPIRE A NEW GENERATION* 225-32 (2007) (arguing that constitutional reform must come from methods such as mock and actual constitutional conventions, as well as internet debate, while discussing how political gridlock makes congressional amendments implausible and proposing twenty-three reforms to improve constitutional functionality).

² See SANFORD LEVINSON, *FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 391-93 (2012) (“We need a new constitutional convention, one that could engage in a comprehensive overview of the U.S. Constitution and the utility of many of its provisions to twenty-first century Americans.” *Id.* at 391.); LEVINSON, *supra* note 1, at 168-80 (discussing the need for a referendum to revise substantially or even replace the U.S. Constitution and the potential to achieve significant reform within the confines of Article V).

to the concerns of popular majorities or to the citizenry in general.³ He also observes that the resulting deformed ordinary politics is incapable of taking the steps necessary to correct these and other clearly identified constitutional flaws.⁴ For this reason, Levinson calls for a national constitutional convention, the members of which would be chosen by lottery.⁵ This would prevent the selection of “single-issue zealots who might . . . prevail in elections,” as elections are generally held in the United States at present.⁶ The delegates to the proposed convention would then be expected to write a new constitution for the American people to ratify.⁷

Other contemporary calls for a constitutional convention or constitutional reform similarly seek an escape from ordinary politics. Each reformer insists that the constitutional convention or referendum be structured in ways to make deliberations immune to the ills afflicting the contemporary electoral and governance processes in the United States. Larry Sabato proposes to escape the pathologies of contemporary politics by having Congress propose rules for the convention and the selection of delegates that will make the convention immune to the ills that presently afflict Congress.⁸ Akhil Amar proposes to escape the pathologies of contemporary politics by either a national referendum on constitutional amendments or a new constitution.⁹ Richard Labunski believes that the internet will enable Americans interested in a second constitutional convention to maneuver around the pathologies of contemporary politics.¹⁰ Political parties are conspicuously absent from the project of constitutional reform. Under Levinson’s model, citizens discuss the

³ See LEVINSON, *supra* note 1, at 6-9 (“We must recognize that a substantial responsibility for the defects of our polity lies in the Constitution itself.” *Id.* at 9.).

⁴ See *id.* at 171 (“Given the central thesis of this book, it would be almost self-contradictory to say that the remedy to our most basic ills lies in ordinary politics.”).

⁵ LEVINSON, *supra* note 2, at 391-93.

⁶ *Id.* at 392.

⁷ See *id.* at 391-93.

⁸ SABATO, *supra* note 1, at 205-16.

⁹ Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside of Article V*, 55 U. CHI. L. REV. 1043, 1044-46 (1988) (“I believe that the first, most . . . important, if unenumerated, right of the People is the right of a majority of voters to amend the Constitution—even in ways not expressly provided for in Article V.”).

¹⁰ RICHARD LABUNSKI, *THE SECOND CONSTITUTIONAL CONVENTION: HOW THE AMERICAN PEOPLE CAN TAKE BACK THEIR GOVERNMENT* 6 (2000). Specifically, Labunski argues:

[T]hrough new communication technology such as the Internet, and more traditional forms of mass media, the American people can organize a series of meetings – beginning at the congressional district or county level, then moving on to a state convention, and finally culminating in a national ‘preconvention’ in Washington, D.C. – where petitions can be written to give to state legislators . . . [which] will propose a subject area for a constitutional amendment and will ask legislators to forward them to Congress. . . . Prior to the Internet, such an undertaking would have been almost impossible.

Id.

Constitution on their own initiative at potluck dinners and engage in petition drives.¹¹ When Sabato's Members of Congress make rules for the constitutional convention, they do so as Americans rather than as Democrats and Republicans.¹² Labunski's websites substitute for partisan organization.¹³ Democratic and Republican Party elites, apparently aware that constitutionally induced polarization and hyperpartisanship are central to contemporary constitutional dysfunctions, are assumed to facilitate (or at least not interfere with) grassroots efforts to break the stranglehold that the two major political parties have on contemporary constitutional politics.¹⁴

These well-intentioned calls for nonpartisan constitutional conventions or referendums suffer the same difficulties that befell the mice who sought to bell the proverbial cat. Each proposed solution can be implemented only if the problem is either assumed away or largely resolved before the proposed solution is implemented. The mice can bell the cat only if the cat will, for unknown reasons, not bother the mice during the belling process or if the mice find some other means for neutralizing the threat of the cat during the belling process.¹⁵ A nonpartisan constitutional convention can resolve the problems created by hyperpartisanship and polarization only if that polarization will for unknown reasons not influence the process used to create and staff the convention, or if Americans find some other means of neutralizing the harms caused by polarization while establishing the constitutional convention. A nonpartisan constitutional referendum will not be beset with polarization and hyperpartisanship only if constitutional reformers first successfully find a way to mitigate substantially the constitutional problems that polarization and hyperpartisanship cause. If Americans successfully overcome polarization when creating the nonpartisan constitutional convention or referendum, however, then they have demonstrated that they can resolve the problems that polarization causes without formal constitutional reform. Acknowledging that

¹¹ LEVINSON, *supra* note 1, at 173-74 (proposing a constitutional convention generated from citizen-driven dialogue and petition drives to offer substantially more equal representation by population than exists in the current congressional system).

¹² See SABATO, *supra* note 1, at 205-08 (describing his expectation that Members of Congress would reach political consensus on ground rules for a constitutional convention "lest their constituents take revenge on them at the ballot box").

¹³ See LABUNSKI, *supra* note 10, at 231-44 ("[A] growing number of campaign strategists believe the Internet is likely to become a genuinely important political tool by the 2000 presidential election.").

¹⁴ See *id.* at 242-46 (discussing the difficulties that political advocates who use the internet to seek reform will face, including cost, political hostility, and possible legal action); SABATO, *supra* note 1, at 9-10 ("Many of our nation's most prominent elites will resist such an approach. . . . Some sincerely and others conveniently believe that a Constitutional Convention [made possible by the internet] would become 'runaway' and enact destructive changes from the far right or left.").

¹⁵ See AESOP, *The Mice in Council*, in AESOP'S FABLES 2 (V.S. Vernon Jones trans., Avenel Books 1912) (1484).

political success, a nonpartisan convention might immediately disband, serve other purposes, or merely take the steps necessary to entrench the constitutional politics that substantially mitigated the baneful influence of polarization on the electoral and governance processes in the United States.¹⁶

Constitutional reformers who propose belling the partisan cats do so because they regard the structure of contemporary constitutional politics as the problem to be overcome and attribute flaws in the small-c constitutional order to flaws in the big-C Constitution or constitutional text. Levinson maintains that certain constitutional provisions directly promote undemocratic and inefficient government,¹⁷ and are partly responsible for generating political institutions and practices that exacerbate dysfunctional government in the United States.¹⁸ When prominent citizens complain of polarization and other politics ills, Levinson asks them “to ‘connect the dots’ between our ‘institutions’ and the Constitution that created them.”¹⁹ Polarization, for example, is partly a consequence of the constitutional system used to elect Members of Congress.²⁰ Constitutional reform must therefore be performed outside the infected normal channels of ordinary constitutional politics and be designed to alter fundamentally what constitutes ordinary constitutional politics in the United States.²¹ Given the improbability of the cat voluntarily foregoing chasing the mice, the power structure in the basement must be changed by means outside the system of present governance.

¹⁶ For example, members of the convention might agree on a number of constitutional roundabouts that neutralize the baneful influence of such constitutional provisions as the Electoral College and state equality in the Senate. See Vikram David Amar, *Rewriting the Constitution's Basic "Structural" Provisions: When a Constitutional Convention for Electoral Change Is Necessary, and What It Might Be Expected to Accomplish*, 7 ELECTION L.J. 245, 248-51 (2008) (discussing the limitations of proposed reforms to electoral politics and Supreme Court terms that stem from entrenched partisanship and federalism).

¹⁷ See LEVINSON, *supra* note 1, at 25, 166; see also ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 73-120 (2d ed. 2003) (discussing the history of the Electoral College, “inherent democratic defects” in the electoral process, and constitutional responses to the problems of representation and democratic participation).

¹⁸ See Sanford Levinson, *What Are We to Do About Dysfunction? Reflections on Structural Constitutional Change and the Irrelevance of Clever Lawyering*, 94 B.U. L. REV. 1127, 1131-33 (2014) (outlining a broad argument covering two of Levinson’s own books regarding the need for a constitutional convention to address inexorable deficiencies in the current Constitution that make needed reform within its confines impossible).

¹⁹ Sanford Levinson, *How I Lost My Constitutional Faith*, 71 MD. L. REV. 956, 972 (2012) (drawing the connections between constitutional structure, dysfunction, and public dissatisfaction with government institutions).

²⁰ See LEVINSON, *supra* note 1, at 147-48 (explaining how the “formal, locality-based institutional structure set out on the Constitution,” which established a framework for representation, was incapable of forestalling the Civil War, and describing how modern politics, which is less regionally focused, is also ineffective at creating national harmony).

²¹ See *id.* at 25-166 (detailing why many provisions of the Constitution stifle needed reforms, and proposing that reform must therefore come through nontraditional avenues).

Shifting focus from the big-C Constitution to the small-c constitutional order casts doubt on this diagnosis. The influence of constitutional provisions on constitutional politics throughout American history has been a variable rather than a constant. Constitutional provisions that, at present, help to paralyze and polarize constitutional politics often facilitated pluralist bargaining during the New Deal and Great Society. The American experience through much of the twentieth century more generally demonstrates that the Constitution of the United States does not inhibit government officials from performing basic government functions when political competition exists largely between two nonideological parties, and demonstrates further that the Constitution allows two nonideological parties to thrive for long periods of time. Seen from this historical perspective, contemporary constitutional disorders are better described as a consequence of two polarized parties trying to operate within a constitutional order that New Dealers designed to be managed by two nonideological parties, rather than as timeless defects or the necessary consequence of an effort to operate an eighteenth-century constitution in a twenty-first-century world.²²

The same failure to understand the dynamic relationship between constitutional provisions and the politics responsible for mistakenly diagnosing contemporary constitutional dysfunction are also responsible for failed cures for this dysfunction. Americans cannot fix the constitutional provisions that facilitate and exacerbate political polarization by temporarily wishing away the resulting polarized political order. There are no magical means for escaping the structure of constitutional politics at a given time. As Professor Stephen Skowronek observes in *Building the New American State*, new constitutional orders are necessarily fashioned through the medium of the ancient regime, at least when the transition is relatively peaceful.²³ Constitutional transitions in a polarized political order are managed by and designed to serve the interests of polarized political actors.²⁴

²² See *infra* notes 160-83 and accompanying text.

²³ STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 285 (1982) (“Whether a given state changes or fails to change, the form and timing of the change, and the governing potential in the change – all of these turn on a struggle for political power and institutional position, a struggle defined and mediated by the organization of the preestablished state.”). Quentin Skinner’s observation that all revolutionaries “march backwards into battle” points to the fact that new constitutional orders are fashioned through the median of the ancient regime, even when the transition is not peaceful. 1 QUENTIN SKINNER, *VISIONS OF POLITICS: REGARDING METHOD* 149-50 (2002) (“[H]owever revolutionary such ideologists may be, they will nevertheless be committed, once they have accepted the need to legitimize their actions, to showing that some *existing* favourable terms can somehow be applied as apt descriptions of their behaviour. All revolutionaries are to this extent obliged to march backwards into battle.”).

²⁴ See SKOWRONEK, *supra* note 23, at 285.

The constitutional reforms promoted by powerful political actors more often resemble what Professor Ran Hirschl describes as hegemonic preservation than social revolution.²⁵ Political leaders during the New Deal Era transformed constitutional practices so that these practices would better fit a constitutional politics premised on competition between two nonideological parties.²⁶ Contemporary constitutional reform managed by contemporary political leaders will most likely transform inherited New Deal Era constitutional practices so they better fit a constitutional politics structured by competition between two or more ideological parties.²⁷ The transition from one constitutional order to another will most likely take place either as a result of an agreement between crucial polarized Democratic and Republican Party elites or, more likely, as a result of a series of elections that gives one ideological party the firm control over governing institutions necessary to transition to a new constitutional order that better reflects that party's substantive and procedural constitutional commitments. The nonpartisan constitutional convention contemporary constitutional reformers desire will be, at best, a way to consolidate the new constitutional order rather than the crucial event that transforms the ancient regime.

The challenge Americans face in the early twenty-first century is to overcome political polarization by constitutional means at a time when each polarized party prefers the dysfunctional constitutional status quo to a new constitutional order operated by the rival party, and when each party exercises the control over at least one constitutional institution necessary to prevent the birth of a new constitutional order dominated by its rival. Our problem is that Franklin Roosevelt's Constitution has become dysfunctional, not that James Madison's Constitution is senile.²⁸ The New Deal Constitution was designed to be run by nonideological parties.²⁹ Courts made the civil liberties policies that both Republican and Democratic Party elites prefer.³⁰ Elected officials made the commercial and foreign policies that tended to hew to the political center.³¹ This constitutional order can be neither operated successfully nor transformed easily by two ideological parties, particularly when constitutional disagreements between Republican and Democratic elites are stronger and

²⁵ See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 11 (2004).

²⁶ Cf. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 446-50 (1987) (discussing how agencies created during the New Deal Era were designed to blend government functions previously kept discrete under separation of powers jurisprudence, using administrative safeguards against factionalism).

²⁷ See *infra* notes 184-96 and accompanying text.

²⁸ See *infra* Parts II, III.

²⁹ Cf. Sunstein, *supra* note 26, at 446-50.

³⁰ See 2 HOWARD GILLMAN ET AL., *AMERICAN CONSTITUTIONALISM: RIGHTS AND LIBERTIES* 480, 482 (2013).

³¹ See *infra* notes 142-57 and accompanying text.

cover more issues than disagreements between less affluent, less educated, and less politically efficacious Republicans and Democrats.

All longstanding constitutional regimes go through cycles of greater or lesser dysfunction. That Americans are presently experiencing some constitutional dysfunction is not a constitutional abnormality, a cause for particular alarm, or an inevitable consequence of operating an eighteenth-century constitution in a twenty-first-century world. Constitutional dysfunctions create constitutional crises only when powerful forces within the constitutional order, often augmented by existing constitutional norms, are able and have the incentives needed to prevent the formal, semiformal, or informal constitutional changes necessary to repair identifiable constitutional failings.³² The Madisonian “Constitution Against Parties” did little to inhibit the rise of political parties that enabled constitutional government to function relatively effectively throughout the nineteenth century.³³ The polarized constitutional order of the early-twenty-first century, by comparison, inhibits the rise of less ideological parties that might effectively operate the existing constitutional order and the sort of constitutional institutions congenial to the functional operation of a polarized political regime.

The following pages are designed to sharpen debates over whether the Constitution of the United States and the American constitutional order are presently dysfunctional, the nature of any dysfunctions, and how underlying regime flaws are likely to be corrected. Rather than focusing primarily on constitutional text, this Article explores the dynamic ways in which constitutional processes have influenced and been influenced by the structure of constitutional politics. Part I explains why constitutional dysfunction is best conceptualized as the failure of a constitutional order rather than as a consequence of a flawed constitutional text, and why dysfunction typically occurs when a regime is unable to transition from a dysfunctional constitutional order to better constitutional politics. Part II examines the New Deal constitutional order, and explains why the transition to a regime operated by two nonideological parties was fairly painless, and details why that regime was able to operate successfully under the formal rules established in 1789. Part III details the increased polarization of the two major parties, highlights the problems polarized parties that operate the New Deal constitutional order face, and explains why that polarization also inhibits a transition to a better constitution order. Those who champion constitutional reform must accept their incapacity to bell the partisan cats. Most likely, the present constitutional dysfunction will end only with the triumph of one major party. A slight chance

³² See MARK A. GRABER, *A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM* 144-72 (2013).

³³ RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840*, at 40-41, 64-73 (1969) (describing how modern political parties gained popularity as their sophistication, discipline, and ability to connect with expanding electorates increased).

exists that Americans will find a way to strengthen more centrist tendencies in the present constitutional order. That success, however, will more likely require cooperation from partisan elites than a successful escape from the conditions of contemporary politics.

I. DYSFUNCTIONAL CONSTITUTIONS AND CONSTITUTIONAL ORDERS

Most constitutions do not remain functional for long periods of time. Tom Ginsburg and his fellow researchers observe that fifty percent of all constitutions do not survive their adolescence.³⁴ The average national constitution, they find, is replaced in less than twenty years.³⁵ Constitutional orders function as expected for similarly short periods of time. The United States Constitution of 1789 collapsed in 1800.³⁶ The post-Civil War Constitution was in shreds by 1876, if not by 1868.³⁷ Similar accounts exist of other longlasting constitutional democracies. The texts survive, but the politics are not constrained, created, or constructed as the Framers imagined.³⁸

The capacity of longlasting constitutions to be “preserv[ed]-through-transformation”³⁹ points to an important distinction between constitutional texts and constitutional orders. Since 1789, Americans have been governed largely by the same foundational text while experiencing multiple constitutional orders.⁴⁰ Scholars disagree about the precise number of constitutional orders, but few would dispute that the way in which the

³⁴ See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 129-31 (2009) (analyzing the creation and dissolution of nearly every national constitution since 1789 in order to evaluate information such as the average durations and lifespans of constitutions).

³⁵ See *id.* at 129-31, 213.

³⁶ See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 3-8 (2005) (outlining the electoral problems of the 1800–1801 election that necessitated reform of the 1787 Constitution).

³⁷ See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 122-40 (1994) (detailing the Civil War Amendments, political and Supreme Court responses, and the subsequent dismantling of civil rights legislation at the end of the nineteenth century). See generally Mark A. Graber, *Constructing Constitutional Politics: The Reconstruction Strategy for Protecting Rights* (unpublished manuscript) (on file with author) (discussing the context and history of the post-Civil War amendments).

³⁸ See Eivind Smith, *Introduction*, in *CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS*, at xi, xix (Eivind Smith ed., 1995) (“Countries in which old constitutional texts are subject to judicial enforcement are especially bound to live with a considerable gap between the philosophical and political concepts of the framers and those prevailing today.”).

³⁹ Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 83 & n.421 (2013) (arguing in the context of gay marriage that messaging used in constitutional debates shifts from negative to positive in order to recharacterize arguments while still retaining fundamental perspectives).

⁴⁰ See discussion *infra* Parts II, III.

Constitution constrained, created, constructed, and constituted politics in Jacksonian America differed substantially from the way in which the Constitution performed those same functions after the New Deal.⁴¹ Americans in 2013 live in a different constitutional universe than did their great-great grandparents in 1913, even though only a few constitutional amendments of any importance were ratified during the last 100 years. Presidents perform different functions, the Supreme Court is expected to protect fundamental rights unheard of in previous centuries, and administrative agencies perform tasks that were once performed, if at all, by elected officials.⁴² Many American states, by comparison, change their constitutional text frequently without altering basic features of that state's constitutional order.⁴³ The Louisiana Constitution of 1913, which was proposed and ratified by citizens bent on improving sewers in New Orleans, for example, did little to adjust the way politics was created, constrained, constructed, and constituted in that state.⁴⁴

Constitutional orders are characterized by a set of central purposes or commitments (for example, to advance the one true religion, to promote racial equality, or to grow the economy), various institutions designed to achieve those purposes (for example, a life-tenured judiciary or competition between two major political parties), and a culture composed of people who, to some degree, share various constitutional commitments and are capable of operating the relevant constitutional institutions.⁴⁵ Some elements of a constitutional order are embedded in a constitutional text. Others are not. The Constitution of the United States mandates a life-tenured federal judiciary but is silent on the structure of partisan competition.⁴⁶ In healthy regimes, formal, semiformal, and

⁴¹ Compare 1 HOWARD GILLMAN ET AL., *AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT* (2013) (dividing the period between 1800 and 1960 into five constitutional eras), with ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (3d ed. 2000) (dividing the period between 1800 and 1960 into three constitutional eras).

⁴² See *infra* notes 149-53 and accompanying text (discussing shifts during the New Deal).

⁴³ Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 *TEX. L. REV.* 1517, 1517 (2009) (indicating that state constitutions change more often than the U.S. Constitution does due to less stringent requirements to effect changes).

⁴⁴ See LEE HARGRAVE, *THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE* 12-13 (1991) (“The 1913 document . . . included the 66 amendments to the 1898 Constitution that had been adopted in the intervening years. . . . In the process of incorporating the amendments, the drafters also revised some provisions and added a few others These few changes, however, were annulled by the [state] supreme court.”).

⁴⁵ See Stephen L. Elkin, *The Constitutional Theory of the Commercial Republic*, 69 *FORDHAM L. REV.* 1933, 1943-49 (2001) (discussing the relationship between political institutions and constitutional regimes, as seen through institutional action and political transformation).

⁴⁶ See U.S. CONST. art. III, § 1, cl. 2 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

informal constitutional practices are mutually reinforcing.⁴⁷ Madison thought that the organization of politics in the large republic would buttress the constitutional commitment to republican government.⁴⁸ Thaddeus Stevens thought that Section 2 of the Fourteenth Amendment would generate a constitutional politics conducive to maintaining the “ascendancy” of the Republican Party, which in turn would privilege liberal interpretations of congressional power under the Thirteenth Amendment.⁴⁹

Constitutional dysfunctions occur when constitutional purposes, constitutional institutions, and the constitutional culture are misaligned or disharmonic.⁵⁰ Some misalignments may occur on the face of the constitutional text. State equality in the Senate is inconsistent with the constitutional commitment to democracy.⁵¹ Other misalignments result from informal constitutional changes that affect how the constitution is interpreted and implemented at a given time.⁵² The structure of party politics in 1850 inhibited what Republicans thought was a constitutional commitment to place slavery on a “course of ultimate extinction”⁵³ and what the Framers thought was a constitutional commitment to prevent contentious disputes over human bondage from disrupting national union.⁵⁴

⁴⁷ See GRABER, *supra* note 32, at 144-72 (discussing formal, semiformal, and informal proposals for constitutional change, and how those proposals can address constitutional deficiencies); Elkin, *supra* note 45, at 1945-49 (describing nature of political rule in formal processes and informal actions that define the scope of power and representation in “good regimes”).

⁴⁸ THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 2003) (“[E]xtensive republics are most favorable to the election of proper guardians of the public weal . . .”).

⁴⁹ See CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865) (statement of Rep. Stevens) (arguing that Section 2, which reduces the representation of states who refuse suffrage to males over twenty-one years, was necessary to prevent representatives from southern states from claiming inordinate political power in “the White House and the halls of Congress,” with “the reestablishment of slavery [being] the inevitable result” – suffrage being key to the “Republican ascendancy” by more equally dividing representation).

⁵⁰ See GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY 1-33 (2010) (explaining why constitutional identity and “dissonance within and around the constitution” are central to understanding constitutional dysfunction).

⁵¹ See LEVINSON, *supra* note 1, at 61-62 (comparing the Framers’ desire for equal representation to how the structure of the Constitution is antithetical to even moderate reform of Senate representation).

⁵² See, e.g., JACOBSON, *supra* note 50, at 136-212 (detailing how amendments and court interpretations of constitutional law affect and are affected by U.S. citizens’ understanding of both the Constitution and emulating foreign models, such as those in Israel, Ireland, and India).

⁵³ Abraham Lincoln, “A House Divided”: Speech at Springfield Illinois (June 16, 1858), reprinted in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461 (Roy P. Basler ed., 1953).

⁵⁴ MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 105-06

Dysfunctional constitutions and dysfunctional constitutional orders are different phenomena, even if they are often related. Citizens can experience a dysfunctional constitution without living in a period of dysfunctional constitutional order. They may recognize that a constitution is not serving basic regime purposes and go about replacing that constitution with a better fundamental law.⁵⁵ The underlying constitutional order in these circumstances is quite functional, because people are able to recognize that their constitution has ceased to constrain and construct politics in appropriate ways, and have the capacity to ratify a new constitution that does constrain and construct politics in appropriate ways. The underlying constitutional order during the 1780s was quite functional in this sense. Americans recognized that the Articles of Confederation were dysfunctional and were able to replace that text with the more functional Constitution of the United States.

Citizens can also experience a dysfunction within a constitutional order without necessarily experiencing a dysfunctional constitutional order. Some informal constitutional practices may prevent a constitution from appropriately constraining and constructing politics. A regime's education system, for example, may not inculcate students with the respect for fundamental civil rights necessary to achieve the constitutional commitment to a free society. Rather than change the civil rights that a constitution protects or the constitutional commitment to a free society, citizens in that regime may reform the underlying educational system so that voters and officials are more likely to be motivated to protect existing civil rights. In these circumstances both the constitutional text and constitutional order as a whole are quite functional, because people are able to identify and reform political practices that inhibit the constitution from appropriately constructing and constraining politics. Martin Van Buren demonstrated how a constitutional order can be reformed without changes to the constitutional text when he and his political allies created a party of the people that Democrats believed would better enable Americans to maintain the original constitutional commitments to limited government and federalism.⁵⁶

Constitutional dysfunction is the stuff of ordinary constitutional politics. No constitution constrains, creates, constructs, or constitutes politics as any framer or ratifier expects. Framers make mistakes about how constitutions will work.

(2006) (describing how the Framers structured the Constitution and the balances of power it prescribes to delay a national debate over slavery so as to preserve national unity, and how this structure shaped party politics through the Civil War).

⁵⁵ See JACOBSOHN, *supra* note 50, at 15-18 ("In the United States the difficulties in adapting the [Constitution] to changing circumstances is a staple of Government 101. That predicament, however, has inspired some very creative efforts to construct alternate understandings to overcome the formal obstacles to constitutional transformation.").

⁵⁶ See GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS* 35-50 (2002); JOEL H. SILBEY, *MARTIN VAN BUREN AND THE EMERGENCE OF AMERICAN POPULAR POLITICS*, at xii-xiii (2002).

The Constitution of the United States, designed to prevent the rise of political parties, could be operated effectively only by political parties.⁵⁷ Framers fail to predict informal constitutional changes that alter how constitutional institutions function. Southerners who anticipated that the House of Representatives would become a bastion of proslavery sentiment were stunned when the U.S. population grew in an unexpected, northwestward direction.⁵⁸ Even when a constitution functions as expected, citizens may make new demands on a constitutional order that the framers did not anticipate. Americans now expect the national government to solve problems that they believed were state matters in the early nineteenth century.⁵⁹ Constitutional orders are as fickle as constitutions. The Mexican War wreaked havoc with the efforts of Jacksonian politicians to establish a constitutional order that would facilitate bisectional compromises on slavery.⁶⁰

Constitutional change is as much the stuff of ordinary constitutional politics as is constitutional dysfunction. Politicians sometimes react to constitutional failures by changing the foundational text of the regime. Americans in 1789 replaced the Articles of Confederation with the Constitution. Rather than replacing the constitution outright, political leaders may also reconfigure the underlying constitutional order. During the 1930s, the way in which American governing institutions functioned, the services they provided, and the limits on their powers were transformed, even though the constitutional text remained untouched.⁶¹ Donald Lutz's observation that nations with hard-to-amend constitutions typically have fairly loose practices of constitutional interpretation may also capture broader dimensions of constitutional change.⁶²

⁵⁷ See SIDNEY M. MILKIS, *POLITICAL PARTIES AND CONSTITUTIONAL GOVERNMENT* 1-12 (1999) (“[I]t is difficult to imagine how representative government could work in a large complex society like our own without party politics.”).

⁵⁸ GRABER, *supra* note 54, at 126-28 (discussing population shifts in the early nineteenth century and their impact on party politics, constitutional dysfunction, and national disharmony).

⁵⁹ See R. Shep Melnick, *The Conventional Misdiagnosis: Why “Gridlock” Is Not Our Central Problem and Constitutional Revision Is Not the Solution*, 94 B.U. L. REV. 767, 768 (2014) (manuscript at 2) (“[O]ur central problem is not that government ‘can’t get anything done’ or that our institutions have become insulated from public opinion, but rather that we are doing so many things and responding to so many political demands that we are incapable of resolving the serious conflicts among them.”); see also GRABER, *supra* note 32, at 247 (indicating that the recent financial crisis may have been the result of “a constitutional mismatch between [American] demands on government and government capacity to satisfy those demands”).

⁶⁰ GRABER, *supra* note 54, at 151-53.

⁶¹ See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 279-382 (1998) (discussing how President Roosevelt, the New Deal Congress, and the Hughes Court created “the modern activist state”); GILLMAN ET AL., *supra* note 41, at 417-22.

⁶² Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION* 237, 241-42 (Sanford Levinson ed., 1995).

Perhaps all nations experience fundamental constitutional change at the same rate, the only difference being whether the crucial step in the transition process is an alteration in the formal constitutional text or alterations in those semiformal and informal constitutional practices that make up a constitutional order.

Constitutional failures that inhibit only the functioning of a discrete element of a constitutional order are often easy to remedy, as long as formal, semiformal, and informal channels of constitutional change remain open.⁶³ Constitutional politics during the early republic provide one example of a successful constitutional repair.⁶⁴ The original constitutional system for electing the President quickly broke down.⁶⁵ The rules mandated by Article II almost failed to produce a winner in the 1800 national election, and created severe political difficulties during the 1824 national election.⁶⁶ Americans responded to these events by first changing the constitutional text and then transforming the constitutional order. Political actors ratified the Twelfth Amendment in 1804 and transitioned during the 1830s from a deferential political culture to a party system that, for twenty years, was able to operate the constitutional system for electing the President relatively smoothly.⁶⁷

Constitutional failures create severe constitutional crises only when they infect the mechanisms for constitutional change as well as the immediate functioning of the constitutional order. The constitutional failures that occurred during the 1850s, for example, were not as localized as the previous breakdown in the original constitutional politics for selecting the President.⁶⁸ Constitutional institutions in 1860 privileged the election of sectional extremists in Congress and a President who sought support only from northern

⁶³ See GRABER, *supra* note 32, at 144-72.

⁶⁴ See ACKERMAN, *supra* note 36, at 3-8 (outlining the electoral problems in the 1800 election that necessitated reform of the 1787 Constitution).

⁶⁵ *Id.*

⁶⁶ *Id.* at 3-8, 93-94 (describing ballot problems and other problems not anticipated by the original Framers that occurred in the 1800 election and that led to a similar crisis in the 1824 election).

⁶⁷ See *id.* at 203-23 (detailing the reforms of the electoral process made possible by the Twelfth Amendment); RONALD FORMISANO, *THE TRANSFORMATION OF POLITICAL CULTURE: MASSACHUSETTS PARTIES, 1790S-1840S*, at 305-43 (1983) (describing the rise of political parties at the state level in Massachusetts, the transformation to national organizations, and their implications for representation and elections); HOFSTADTER, *supra* note 33, at 212-71 (discussing how modern political parties gained popularity as their sophistication, discipline, and ability to connect with expanding electorates increased); LEONARD, *supra* note 56, at 99-155 (exploring the nationalization of political parties, and how this affected constitutional functionality, constitutional interpretation, and electoral politics).

⁶⁸ See GRABER, *supra* note 54, at 153-67 (analyzing political tensions and dysfunction over national issues such as state admission and presidential elections in the decade preceding the Civil War).

states.⁶⁹ One result of this constitutional failure was a breakdown in the constitutional commitment to bisectional compromise on slavery issues.⁷⁰ The other result of this constitutional failure was a breakdown in the constitutional system's capacity to change.⁷¹ Americans living under a system in which crucial levers of power were held by sectional extremists could not transition peacefully into a constitutional order in which constitutional institutions were structured in ways that privileged compromise on slavery issues; nor could they transition peaceably into a constitutional order that was either all free or all slave.⁷² A civil war was necessary to create a new, more functional regime.⁷³

Classical realignment theory recognized that healthy polities experience fairly consistent cycles of constitutional dysfunction and alteration. Walter Dean Burnham's seminal work on American political development observes:

The socioeconomic system develops but the institutions of electoral politics and policy formation remain essentially unchanged. Moreover, they do not have much capacity to adjust incrementally to demand arising from socioeconomic dislocations. Dysfunctions centrally related to this process become more and more visible, until finally entire classes, regions, or other major sections of the population are directly injured or come to see themselves as threatened by imminent danger. Then the triggering event occurs, critical realignments follow, and the universe of policy and of electoral coalitions is broadly redefined.⁷⁴

The following pattern best translates the idiom of American political development into the language of American constitutional development: distinctive constitutional orders form, the citizens of which are able to operate fairly successfully constitutional institutions as vehicles for pursuing broadly shared constitutional purposes; over time constitutional misalignments occur;

⁶⁹ *Id.* at 153-54, 162-67 (“Partisan dynamics and constitutional malfunctions . . . played a[n] important . . . role. . . . Slavery became the issue of choice because Article II enabled free-state coalitions to capture the presidency without winning any slave-state votes or popular majorities and because the processes for electing national officials in local elections prescribed by Article I privileged sectional appeals. . . . Constitutional rules frequently facilitated the election of free-state congressmen who held more extreme antislavery views than the average voter in their state or district.”).

⁷⁰ *See id.* at 154-56 (“The collapse of the Whig Party, the weakening of the Northern Jacksonians, and the rise of Republicans destroyed the Democrats’ bisectional coalition for national expansion [alternating slave and free states].” *Id.* at 155.).

⁷¹ *Id.* at 156-67 (detailing how disagreements over slavery within parties caused substantial fracturing, which led to hyperpartisanship, impairing reform and compromise in Congress leading up to the Civil War).

⁷² For the detailed argument in this paragraph, see GRABER, *supra* note 54, at 153-67.

⁷³ *See id.*

⁷⁴ WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 181 (1970).

new social groups arise that do not share basic regime principles; governing institutions no longer function in ways that promote constitutional ends; and eventually, the constitutional order crumbles and, in a healthy regime, is either replaced by a new constitution, a new constitutional order, or both. This account is consistent with Burnham's understanding that realignments are constitutional phenomena. He refers to "the constitution-making role of the American voter"⁷⁵ during critical realignments and insists that such realignments are necessary to maintain the broader regime.⁷⁶ As Burnham explains, critical realignment:

[H]as been the chief means through which an underdeveloped political system can be recurrently brought once again into some balanced relationship with the changing socioeconomic system, permitting a restabilization of our politics and a redefinition of the dominant Lockian political formula in terms which gain overwhelming support from the current generation.⁷⁷

Mistakenly, classical realignment theory insisted that critical elections played a crucial role in this cycle of dysfunction and alteration. Such elections, Burnham maintains, replace an old regime with a new dominant party, a new party system, and a new constitutional order.⁷⁸ More recent scholarship questions whether critical elections are the "mainsprings" of major political or constitutional change in the United States.⁷⁹ Constitutional practices that characterize one constitutional order may decay and be replaced over time rather than be abandoned in a single burst of electoral energy. David Mayhew's analysis of national elections "points to gentle party decline across many decades . . . not to a valley-peak-valley realignment model."⁸⁰ Karen Orren and Stephen Skowronek maintain that constitutional politics in the United States is characterized by "intercurrence."⁸¹ The American regime, in

⁷⁵ *Id.*

⁷⁶ *Id.* at 180-87 (describing changing party alignments and identification shifts, and how these changes affect perceptions of and adherence to constitutional regimes).

⁷⁷ *Id.* at 181-82.

⁷⁸ See WALTER DEAN BURNHAM, *THE CURRENT CRISIS IN AMERICAN POLITICS* 100-01 (1982) (detailing the cycle of political dysfunction, discontent, and critical electoral realignments).

⁷⁹ For a particularly good set of essays, including Walter Dean Burnham's defense of realignment theory, see *THE END OF REALIGNMENT? INTERPRETING AMERICAN ELECTORAL ERAS* (Byron E. Shafer ed., 1991).

⁸⁰ DAVID R. MAYHEW, *ELECTORAL REALIGNMENTS* 65 (2002).

⁸¹ KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 108 (2004) (discussing the theory of intercurrence, according to which autonomous institutions change in regular cycles, where citizens experience dysfunction, politicians capitalize on that with messaging, and moderate reforms occur).

their view, consists of relatively autonomous institutions with distinctive cycles of dysfunction and alteration.⁸²

What realignment theory nevertheless contributes to constitutional theory is the idea that constitutional orders must have the internal resources necessary to adjust as political, social, cultural, technological, and demographic changes increasingly misalign constitutional commitments, government institutions, and the broader constitutional culture. The adjustment processes include critical elections, secular realignments, reform of informal constitutional institutions, changes in the functioning of existing constitutional institutions, constitutional workarounds,⁸³ reinterpretation of existing constitutional provisions, constitutional amendments, new constitutions, or most likely, many of the above in combination.⁸⁴ The Jacksonian Era, for example, witnessed the rise of political parties, the transformation of the Senate and cabinet, sharply narrower constructions of national power, and the substantial revision or replacement of many state constitutions.⁸⁵

The way in which modified realignment theory emphasizes the processes for transforming a constitutional order cannot and should not be reduced to analysis about the difficulty or merits of formal constitutional change. Whether provisions such as Article V, which make the Constitution of the United States difficult to amend formally, constitute “the most important bars of our constitutional iron cage precisely because it works to make practically impossible needed changes in our polity”⁸⁶ depends on how, in different times and places, provisions for constitutional amendment influence and are influenced by semiformal and informal processes for constitutional changes. As discussed previously, hard-to-amend constitutions are often interpreted more flexibly.⁸⁷ Even those constitutional provisions that seem incapable of creative interpretation have not inhibited important constitutional change. The United States Senate was transformed during the early nineteenth century from an institution that resembled, in many respects, the English House of Lords, to an institution that functioned quite similarly to the House of Representatives, even though no formal constitutional change was made to the rules for electing

⁸² See *id.* at 108-11.

⁸³ See Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1514-15 (2009).

⁸⁴ *Id.* at 1508-14 (describing how constitutional reform advocates use workarounds, a concept that encompasses many of the above adjustments, to improve functionality without completely dismantling the Constitution itself).

⁸⁵ See GILLMAN ET AL., *supra* note 41, at 185-90. See generally DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820S (Merrill D. Peterson ed., 2010) (1966) (recounting debates from the constitutional conventions that took place in Massachusetts, New York, and Virginia in the 1820s).

⁸⁶ LEVINSON, *supra* note 1, at 160.

⁸⁷ See *supra* note 37 and accompanying text (discussing the breakdown and restructuring of constitutional order around the Civil War).

Senators or how Senators influenced lawmaking.⁸⁸ By forcing Americans to live under existing constitutional norms, Article V may facilitate vital, informal constitutional changes that promote greater constitutional democracy. No guarantee exists that restricting exit options will improve the quality of voice. Strict divorce rules that probably improve some marriages almost certainly make other marriages a living hell. The point, as Albert Hirschmann makes in a related context, is that no ideal balance between exit and voice, or formal, informal, and semiformal constitutional changes, exists in a vacuum.⁸⁹ In order to assess the capacity of a constitutional order to transform in response to increased systemic dysfunctions, reformers must examine how those dysfunctions facilitate or impede all means for constitutional change, not just those listed in the constitutional text.

The American constitutional experiences during the twentieth and early-twenty-first centuries demonstrate how the same constitutional rules that, in some circumstances facilitate, or at least do not obstruct, transition to a better constitutional order impede or prevent citizens in other circumstances from belling the cats responsible for maintaining a dysfunctional constitutional status quo. Constitutional texts from the birth of the republic failed to cabin constitutional politics. Americans in the nineteenth century successfully transformed a “Constitution Against Parties” into a constitutional order operated by the party of the people who remained loyal during the Civil War.⁹⁰ Americans by the middle of the twentieth century had successfully transformed a constitutional order operated by the party of the people who remained loyal during the Civil War into a constitutional order operated by two nonideological parties and a federal judiciary whose decisions reflected the liberal attitudes of elites in both major partisan coalitions.⁹¹ This constitutional order served basic constitutional purposes about as well as humanly possible, even though the constitutional text was over 150 years old and contained numerous provisions that seemed “stupid.”⁹² That order began breaking down during the last part of the twentieth century. The nonideological parties of the New Deal/Great Society Era gradually evolved into two more ideological parties that structure contemporary constitutional politics.⁹³ Our constitutional order is presently dysfunctional because these two ideological parties, each competing to be the

⁸⁸ See ELAINE K. SWIFT, *THE MAKING OF AN AMERICAN SENATE: RECONSTITUTIVE CHANGE IN CONGRESS, 1787-1841*, at 1 (1996) (describing the original constitution of the Senate and changes to informal and semiformal Senate procedural rules that allowed the Senate to develop a more American identity, akin to that of the House of Representatives).

⁸⁹ See ALBERT O. HIRSCHMANN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 124 (1970) (rejecting the possibility that there is “some optimal mix of exit and voice”).

⁹⁰ Graber, *supra* note 37.

⁹¹ GILLMAN ET AL., *supra* note 41, at 419, 421.

⁹² *Id.* at 417.

⁹³ *Id.* at 422.

party of the people, cannot transform or operate efficiently a constitutional order designed to be operated by two nonideological parties.

II. THE VIEW FROM MIDCENTURY: A CONSTITUTIONAL SUCCESS STORY

The constitutional order in the United States functioned fairly well throughout most of the twentieth century.⁹⁴ Politics in the New Deal/Great Society regime was structured so that American citizens achieved the basic goals of the regime and resolved controversies consistently with broadly shared norms. Public offices were filled and budgets were agreed on, even when each major political party controlled at least one branch of the national government. During the global economic crisis of the 1930s that toppled several constitutional democracies, the American regime remained vibrant. A few demagogues aside, the United States was never in serious danger of drifting into dictatorship. The United States effectively fought and won a world war on two fronts and on at least four continents. In the postwar period the American political economy was the envy of the world. The American economy grew at a steady rate, aided and aided by an expanding and increasingly affluent middle class.⁹⁵ The 1950s and 1960s witnessed the end of racial apartheid in the United States and other dramatic improvements in the civil rights and civil liberties actually enjoyed by American citizens.

Americans at mid-century experienced a functional constitutional order even though the United States during the 1950s and 1960s could hardly be confused with the Garden of Eden or Shangri-La. Political activists, journalists, and scholars documented vast inequalities, rights violations, and political deficiencies. Nevertheless, George Bernard Shaw aptly pointed to the primary source of American constitutional ills when he quipped that “democracy is a system insuring that the people are governed no better than they deserve.”⁹⁶ The governance problems Americans confronted during the New Deal and Great Society were either governance problems experienced by all western democracies (for example, employment and the Cold War) or more rooted in public opinion than the constitutional text. The United States was plagued by severe racial inequalities because many Americans who were committed to white supremacy happily flouted constitutional norms. George Wallace, for example, was more concerned with preserving segregation than taking seriously the Equal Protection Clause.⁹⁷ A fair case can be made that a

⁹⁴ For the best accounts of this time period, see DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* (1999); JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1971* (1996).

⁹⁵ See generally JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (4th ed. 1984) (describing the growth of the middle class caused by increases in manufacturing and demand following World War II).

⁹⁶ See Mark Graber, ‘No Better than They Deserve:’ *Dred Scott and Constitutional Democracy*, 34 N. KY. L. REV. 589, 589 (2007) (quoting George Shaw).

⁹⁷ See DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE*

constitutional order that privileged judicial supremacy generated more racial equality than might have been the case had the United States adopted a more Westminster constitutional order. As Kevin McMahon details, national elected officials who were unwilling to challenge Jim Crow directly were willing to appoint and confirm to the federal bench judges known to oppose racial segregation.⁹⁸

There existed a broad national consensus throughout New Deal and Great Society Eras that the Constitution of the United States was a national blessing. Future Supreme Court Justice Robert Jackson in 1939 celebrated “a Constitutional Renaissance at the present time—a rediscovery of the Constitution.”⁹⁹ Congressmen Maury Maverick in the same year declared, “we need some changes in our constitutional practice, but *none in our Constitution*. We have in our written Constitution all the constitutional authority necessary for effective government.”¹⁰⁰ Overwhelming majorities of Americans rejected any basic change to the constitutional text.¹⁰¹ Rexford Tugwell and the Center for the Study of Democratic Institutions spent a decade fruitlessly trying to convince Americans that an industrial society could not thrive under a Constitution drafted for an agrarian regime.¹⁰² Tugwell was regarded at most as a curiosity and his works were ignored.¹⁰³

The consensual constitutional celebration developed during the New Deal was as rooted in experience as it was in habit or unthinking veneration, at least among Americans on the political left. While conservatives had long promoted a “cult of the Constitution,”¹⁰⁴ American Progressives during the generation before President Franklin Roosevelt took office were more skeptical. In the period between 1880 and 1930, such distinguished scholars as Charles Beard, President Woodrow Wilson, and J. Allen Smith raised significant criticisms of

NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 82-109 (1995) (documenting the origins of southern resistance to desegregation).

⁹⁸ See generally KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* (2004).

⁹⁹ Robert H. Jackson, *Back to the Constitution*, 25 A.B.A. J. 745, 745 (1939).

¹⁰⁰ MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 381-82 (1986).

¹⁰¹ See *id.* at 316, 331 (discussing the results of a poll that surveyed whether U.S. citizens wanted to amend the Constitution).

¹⁰² See *id.* at 332-34 (discussing Tugwell’s work, which produced forty drafts of a new constitutional model that proposed significant changes to legislative representation, “radical reorganization of the entire judiciary,” and creation of a separate regulatory branch of government to address issues particular to an industrialized society).

¹⁰³ See *id.* at 333-34.

¹⁰⁴ See *id.* at 206-13, 219-35 (discussing the blind and patriotic devotion to the Constitution of the “Cult,” and how this devotion inhibited dialogue on structural reform while helping to teach many Americans how to enforce certain constitutional provisions, such as due process).

the Constitution as framed in 1787.¹⁰⁵ After strongly suggesting that the English Constitution was “superior” to the Constitution of the United States,¹⁰⁶ Wilson asserted “the federal government lacks strength because its powers are divided, lacks promptness because its authorities are multiplied, lacks wieldiness because its processes are roundabout, lacks efficiency because its responsibility is indistinct and its actions without competent direction.”¹⁰⁷ Beard claimed, “this crowned Constitution with its halo has been the bulwark of every great national sin—from slavery to monopoly.”¹⁰⁸ Most American liberals after the New Deal, however, were convinced that Americans had successfully repaired the constitutional order without having to change or abandon their inherited constitutional text. Franklin Roosevelt articulated the national ethos during his first inaugural address when he asserted that “[o]ur Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form.”¹⁰⁹

The Constitution of the United States at mid-century seemed particularly attractive when Americans and foreigners adopted a comparative perspective. David Fontana observes a surge in articles on comparative law published by law reviews during the 1950s and 1960s, most of which were “about exporting American constitutional ideas to the rest of the world.”¹¹⁰ Other constitutions in these essays were more often referred to as negative examples than as alternative and possibly better means for governing.¹¹¹ Numerous American

¹⁰⁵ See generally CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (reprt. 1986); JAMES ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT: A STUDY OF THE CONSTITUTION: ITS ORIGIN, INFLUENCE AND RELATION TO DEMOCRACY (1907); WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (Houghton, Mifflin & Co. 15th ed. 1901) (1885).

¹⁰⁶ WILSON, *supra* note 105, at 311-18. Wilson describes the inefficiency of the United States’ form of government, and explains how this inefficiency stems from that fact that the U.S. government, though modeled on the English constitution in place in 1787, was designed to avoid singular authority. *Id.* Wilson further explains that our Constitution’s rigid structure prevented the kind of flexible arrangements that would have allowed for more peaceful transitions and shifts in power in England. *Id.*

¹⁰⁷ *Id.* at 318.

¹⁰⁸ KAMMEN, *supra* note 100, at 201 (“In May 1898, . . . an editorial by young Beard asserted that ‘this crowned Constitution with its halo has been the bulwark of every great national sin—from slavery to monopoly.’”).

¹⁰⁹ *Id.* at 259 (quoting Franklin Roosevelt).

¹¹⁰ David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT’L L. 1, 22-23 (2011).

¹¹¹ See *id.* (“[S]ome of the more notable citations to comparative constitutional law . . . treated the foreign constitutional experience as the negative role model – the experience to avoid – and the American constitutional experience as the one to prioritize.”); Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 423-26 (1996) (detailing how antitotalitarian reaction to Nazism and

jurists, most notably Thurgood Marshall, eagerly travelled abroad to help other nations fashion American-style constitutional institutions.¹¹² Most regimes welcomed this infusion of American constitutionalism. *Time* in 1987 claimed that more than ninety percent of all existing constitutions were modeled after the Constitution of the United States.¹¹³ George Athan Billias's study of the comparative constitutional experience concluded that, as of 1989, "the influence of American constitutionalism abroad was profound in the past and remains a remarkable contribution to humankind's search for freedom under a system of laws."¹¹⁴

Constitutional debate in the United States for much of the twentieth century was limited to the proper interpretation of a few provisions and the role of the Supreme Court as a constitutional authority. Fontana observes, "[t]he most notable scholars that the legal academy has ever produced wrote about how the American Constitution should be interpreted and how judicial review should operate."¹¹⁵ Barry Friedman describes at great length "the academic obsession with the countermajoritarian problem" that drove New Deal and post-New Deal constitutional theory.¹¹⁶ In this theoretical environment, the ratio between complaints about judicial decisions interpreting the Constitution and complaints about the Constitution approached infinity. Conservatives objected to Hughes Court decisions expanding national powers.¹¹⁷ Liberals condemned restraints on civil rights and liberties.¹¹⁸ Both conservatives and liberals as vigorously insisted that the fault lay in the interpreters, not the Constitution.¹¹⁹ "If one were to judge from the corpus of constitutional scholarship over the last sixty years," Friedman observed at the turn of the twenty-first century, "of all

communism influenced judicial and academic legal thought in the decades following World War II).

¹¹² See generally MARY L. DUDZIAK, *EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL'S AFRICAN JOURNEY* (2008); see also Fontana, *supra* note 110, at 12 (providing examples of international legal scholars who visited the United States and of American law professors who travelled abroad to advise various countries on constitutional law issues).

¹¹³ John Greenwald, *A Gift to All Nations*, *TIME*, July 6, 1987, at 92 ("Of the 170 countries that exist today, more than 160 have written charters modeled directly or indirectly on the U.S. version.").

¹¹⁴ GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD, 1776-1989*, at xv (2009); see also David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 *N.Y.U. L. REV.* 762, 764-66 (2012).

¹¹⁵ Fontana, *supra* note 110, at 4.

¹¹⁶ Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 159 (2002).

¹¹⁷ See KAMMEN, *supra* note 100, at 273 (describing dramatic reactions to unfavorable decisions from the Hughes Court, and explaining how conservatives accused the Court of flouting the Constitution).

¹¹⁸ See *id.* at 336-37.

¹¹⁹ For conservative objections to national powers, see *id.* at 269-73. For liberal objections to restrictions on civil rights and civil liberties, see *id.* at 336-56.

of the institutions of American government, it is only the Supreme Court that presents a particular problem of democratic accountability.”¹²⁰

The successful functioning of the American constitutional order throughout much of the twentieth century belies the common claim that the main reason for constitutional dysfunctions at present is the problems inherent in relying heavily on a constitutional text largely drafted in the eighteenth century when governing a twenty-first-century polity.¹²¹ Americans were the envy of the world during the Great Society when they relied on an eighteenth-century text to govern a mid-twentieth-century polity. No doubt constitutions age differently than dogs, turtles, or human beings. Still, no good reason exists for thinking that while constitutions can function for long periods of time, they begin to expire after 200 years, rather than after reaching the ripe age of 175. What little evidence we have suggests that constitutions that reach the age of fifty become almost immortal.¹²²

The success of the American constitutional order throughout much of the twentieth century also puts so-called “constitutional stupidities” in perspective.¹²³ A fair case can be made that such constitutional practices as the Electoral College,¹²⁴ state equality in the Senate,¹²⁵ a late date for inaugurating the President,¹²⁶ a life-tenured judiciary,¹²⁷ and the like make the United States a less democratic and less efficiently governed country. Nevertheless, those

¹²⁰ Friedman, *supra* note 116, at 162.

¹²¹ See DAHL, *supra* note 17, at 7-39 (describing how the Framers’ Constitution came up short due to its inability to predict modern developments and its inclusion of “undemocratic elements,” and providing possible corrections to these shortcomings, both realized and unrealized); Sanford Levinson, *The United States and Political Dysfunction: “What Are Elections For?”*, 61 *DRAKE L. REV.* 959, 980-81 (2013) (suggesting that a constitutional convention is required to reform the Constitution so that it better serves the twenty-first century polity).

¹²² See ELKINS ET AL., *supra* note 34, at 131.

¹²³ See William N. Eskridge, Jr. & Sanford Levinson, *Introduction: Constitutional Conversations*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 1, 1-2 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (defining “constitutional stupidities” as those parts of the Constitution that are “most nonsensical and most harmful for today’s polity,” and suggesting the use of constitutional stupidities as indicators of the Constitution’s flaws and starting points for potential reform).

¹²⁴ See Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES*, *supra* note 123, at 15, 15 (describing the Electoral College as “a brilliant eighteenth-century invention that makes no sense today”).

¹²⁵ See William Eskridge, Jr., *The One Senator, One Vote Clauses*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES*, *supra* note 123, at 35.

¹²⁶ See Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES*, *supra* note 123, at 61.

¹²⁷ See L.H. LaRue, *Neither Force Nor Will*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES*, *supra* note 123, at 57.

practices operated at the margins of American constitutional life for long periods of time. The United States might have been a little more prosperous and a little more democratic in 1960 had New Dealers updated the Constitution to reflect their experience with governance and greater societal commitments to majoritarianism. Nevertheless, at least as compared to the rest of the world, the United States was a prosperous, democratic regime with a state of the art Constitution. Few spoke of a governability crisis or a broken branch of the national government. Various constitutional practices may have been “nothing less than a ticking time bomb” that, in the right circumstances, could create social havoc.¹²⁸ The lesson of the twentieth century, however, may have been that these circumstances were sufficiently unlikely to occur during the New Deal/Great Society regime, and that political actors were better off maintaining the national defense and fighting poverty under existing constitutional rules than creating rules that might prove to be liabilities in a different, unforeseen constitutional order.

Although Americans at most tinkered with the Constitution during the seventy years after the prohibition amendment was repealed in 1933,¹²⁹ the success of the American constitutional order during the mid-twentieth century could not be traced to Madisonian or Reconstruction institutions operating in pristine form. Americans celebrated both the framing and the post-Civil War amendments, but the constitutional order in 1954 was quite different from the constitutional orders in 1789 or 1868. Whether fundamental constitutional commitments were altered remains controversial. Many commentators insist that fundamental substantive constitutional commitments and rules were abandoned during the “Constitutional Revolution” of the 1930s.¹³⁰ New Dealers claimed that they were merely returning to constitutional understandings dating from the Virginia Plan¹³¹ and the Marshall Court.¹³² The constitutional institutions designed to secure those constitutional commitments, however, were unquestionably transformed. Basic changes took place at the turn of the twentieth century that significantly altered the constitutional politics underlying both the original and the Civil War Constitution. These textually

¹²⁸ LEVINSON, *supra* note 1, at 72.

¹²⁹ See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 289-460 (1996).

¹³⁰ See, e.g., ACKERMAN, *supra* note 61, at 255-382 (“A complex web of doctrine, woven by two generations of judges in the long period between 1873 and 1932, was swept away in the space of a decade.” *Id.* at 256-57.). Ackerman makes a similarly transformative claim about the constitutional status of race in the Great Society. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1779-82 (2007).

¹³¹ See Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1338-40 (1934) (arguing that the Commerce Clause “conformed to the standard previously approved” by the Constitutional Convention as part of the Virginia Plan, a broad federal delegation, with respect to “those matters as to which the states were separately incompetent and in which national legislation was essential).

¹³² See *Wickard v. Filburn*, 317 U.S. 111, 120 (1942).

invisible transformations played crucial roles in the operation and success of the New Deal/Great Society constitutional order.

Madison and other Framers designed a “Constitution Against Parties.”¹³³ They believed that factions were the biggest threat to a well-functioning constitutional politics and designed constitutional institutions that they believed would prevent the rise of a two-party system in particular.¹³⁴ Not all or even many Framers endorsed the Madisonian notion that a large republic would prevent the rise of a two party system.¹³⁵ Nevertheless, all agreed that parties were bad and that constitutional politics should be structured to prevent their rise. Richard Hofstadter describes how eighteenth-century elites in the United States thought “the necessary mutual checks would . . . be provided by the elements of the constitution, and not by parties, which were . . . usually thought of . . . as forces likely to upset the desired constitutional balance by mobilizing too much force and passion in behalf of one limited interest.”¹³⁶ President George Washington famously warned his fellow citizens about the vices of partisanship. Parties, he stated in his farewell address, “make the public administration the Mirror of the ill concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common councils and modified by mutual interests.”¹³⁷

President Martin Van Buren, President Abraham Lincoln, and Representative Thaddeus Stevens helped fashion a different constitutional order, one based on rule by the legitimate party of the people. Van Buren insisted that factions were endemic to democratic life.¹³⁸ In order to defeat the “Money Power,” ordinary citizens had to organize.¹³⁹ “[T]he absence of a mass democratic party organization,” Van Buren and his Jacksonian allies believed, “would permit small knots of neo-Hamiltonian elitists to siphon power to the federal government, far from the people in their ‘primary assemblages,’ in

¹³³ HOFSTADTER, *supra* note 33, at 40.

¹³⁴ See THE FEDERALIST NO. 10, *supra* note 48, at 71 (James Madison) (“Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”).

¹³⁵ See Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 657-61 (1999) (revealing that few of those present at the Constitutional Convention took note of Madison’s arguments for expanding the republic to prevent the rise of political factions and that, far from developing a discourse consistent with the Madisonian theory, “other delegates continued to take positions and to make speeches that rested on premises at odds with Madison’s theory”).

¹³⁶ HOFSTADTER, *supra* note 33, at 51.

¹³⁷ President George Washington, Farewell Address (Sept. 19, 1796), in GEORGE WASHINGTON: A COLLECTION 512, 518 (W.B. Allen ed., 1988).

¹³⁸ STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURT 131 (2011) (describing Van Buren as “the intellectual champion of the *permanent* party organization”).

¹³⁹ *Id.* at 167 (“Van Buren conceptualized his permanent party as an institutional buttress of the Constitution against corruption . . .”).

defiance of the strict constitutional enumeration.”¹⁴⁰ Lincoln shared Van Buren’s enthusiasm for parties, substituting the threat of an undemocratic “Slave Power” for Van Buren’s obsession with an undemocratic “Money Power.”¹⁴¹ Rather than attack the Court’s decision in *Dred Scott v. Sandford*¹⁴² as an instance when the Court took power from elected officials, Lincoln repeatedly emphasized that the Taney Court ruling was linked to the Democratic Party and would remain good law only as long as Democrats controlled the national government. “[T]he Dred Scott decision,” he asserted in the fifth debate with Stephen Douglas, “never would have been made in its present form if the party that made it had not been sustained previously by the elections” and that “the new Dred Scott decision, deciding against the right of the people of the States to exclude slavery, will never be made, if that party is not sustained by the elections.”¹⁴³ The post-Civil War amendments were rooted in this commitment to the legitimate party of the people as the primary vehicle for maintaining and achieving basic constitutional commitments. Thaddeus Stevens, the floor manager for the Fourteenth Amendment, repeatedly declared that the primary purpose of the proposed constitutional amendments was to secure the permanent ascendancy of the party of the people who remained loyal during the Civil War.¹⁴⁴ As Senator Henry Wilson declared during the debates:

The enduring interests of the regenerated nation, the rights of man, and the elevation of an emancipated race alike demand that the great Union Republican party, the outgrowth and development of advancing civilization in America, shall continue to administer the Government it preserved, and frame the laws for the nation it saved.¹⁴⁵

Americans in the 1950s and 1960s experienced a very different constitutional politics than either Madison or Stevens anticipated. Instead of a

¹⁴⁰ LEONARD, *supra* note 56, at 13. For a similar interpretation of Van Buren, see ENGEL, *supra* note 138, at 131-69.

¹⁴¹ See SILBEY, *supra* note 56, at xii (“[L]ong before his emergence to greatness, [Lincoln] first made his name as an effective builder and manager of the Illinois Whig Party in the 1830s.”).

¹⁴² *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV.

¹⁴³ Abraham Lincoln, Mr. Lincoln’s Reply, Fifth Debate with Stephen A. Douglas, at Galesburg, Illinois (Oct. 7, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 53, at 219, 232.

¹⁴⁴ See CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865) (statement of Rep. Stevens) (“If they should grant the right of suffrage to persons of color, I think there would always be Union white men enough in the South, aided by the blacks, to divide the representation, and thus continue the Republican ascendancy. If they should refuse to thus alter their election laws it would reduce the representatives of the late slave States to about forty-five and render them powerless for evil.”).

¹⁴⁵ CONG. GLOBE, 39th Cong., 1st Sess. app. at 142 (1866).

constitutional order without parties or structured by a dominant ideological party, constitutional politics at mid-century was being operated by two nonideological parties. Woodrow Wilson first noticed this phenomenon during the late nineteenth century. “Neither of the two principle parties,” he complained, “is of one mind with itself. Each tolerates all sorts of differences of creed and variety of aim within its own ranks. . . . They are like armies without officers, engaged upon a campaign which has no great cause at its back.”¹⁴⁶ Little changed during the first two-thirds of the twentieth century. The Republican Party had a strong liberal wing that provided substantial support for the New Deal and the Warren Court decisions that expanded civil rights and liberties.¹⁴⁷ Southern Democrats bitterly fought the Warren Court and opposed many liberal regulatory reforms, particularly those that benefitted unions.¹⁴⁸

A fair case can be made that New Dealers modified rather than abandoned the “state of courts and parties” that Stephen Skowronek claims structured constitutional politics at the turn of the twentieth century.¹⁴⁹ Elected officials and judges had distinctive functions, even as those functions were altered during the Constitutional Revolution of 1937. Nonideological parties regulated the economy and guided international affairs. Governance by elected officials was appropriate on these matters, New Deal liberals agreed, because the Constitution provided few if any limits on national commercial and foreign policymaking.¹⁵⁰ Courts decided questions about civil rights and liberties. Judicial review was appropriate on these matters, more and more New Deal liberals came to agree, because the Constitution limited the government’s

¹⁴⁶ WILSON, *supra* note 105, at 324.

¹⁴⁷ See NICOL C. RAE, *THE DECLINE AND FALL OF THE LIBERAL REPUBLICANS: FROM 1952 TO THE PRESENT* 25 (1989) (describing a sizeable faction of Republicans who “supported Roosevelt on the major New Deal measure which came before Congress in 1932-36”); Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 *HOW. L.J.* 661, 685 (2013) (“During the 1950s and 1960s, American elites in both the Republican and Democratic parties tended to support racial equality, limiting the influence of religion in public life, broad free speech rights, and providing greater protections for poor persons and persons of color suspected of crimes.”).

¹⁴⁸ See NICOL C. RAE, *SOUTHERN DEMOCRATS* 39-45 (1994) (chronicling Southern Democrats’ rising dissatisfaction with liberal reform, which was spearheaded by their own party and liberal Warren Court decisions, beginning in the later years of the New Deal and coming to a head during the Civil Rights Movement).

¹⁴⁹ SKOWRONEK, *supra* note 23, at 39.

¹⁵⁰ See *Wickard v. Filburn*, 317 U.S. 111, 120-29 (1942) (upholding a reading of the Commerce Clause granting expansive powers to Congress); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318-22 (1936) (“[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution [It is] inherently inseparable from the conception of nationality.”).

power to restrict individuals' rights and the courts were responsible for maintaining constitutional limits on governmental powers.¹⁵¹

The two nonideological parties remade American constitutional institutions in their image. Congress became the site for interest group bargaining.¹⁵² The federal judiciary was charged with protecting the pluralist bargaining process and those excluded from that pluralist bargaining.¹⁵³ Administrative agencies provided the expertise necessary for politically efficacious interest groups to realize the fruits of their legislative bargains.¹⁵⁴ The President articulated broad national visions and ran foreign policy.¹⁵⁵ The "Constitution of Settlement" may have inhibited debates over the precise rules for staffing various institutions, but the above reforms demonstrate how the broader functions of all constitutional institutions were very much part of the "Constitution of Conversation" throughout much of the twentieth century.¹⁵⁶

With important exceptions,¹⁵⁷ political and constitutional commentators celebrated a constitutional order operated by nonideological parties. Political power was constrained by virtue of being dispersed. Domination was

¹⁵¹ See *Chambers v. Florida*, 309 U.S. 227, 241 (1940) ("[C]ourts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . .").

¹⁵² See DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 106-08 (1951) (describing the rise of association and "increasing demands upon and through the government" that occurred in the mid-twentieth century).

¹⁵³ See MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 156-59 (1991).

¹⁵⁴ See SKOWRONEK, *supra* note 23, at 13-14 (arguing that the growth of the administrative state was heavily influenced by government officials who sought to provide services demanded by interest groups, and who struggled with how best to provide efficient services).

¹⁵⁵ See JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 3-9 (1987) (distinguishing the modern presidency from that of nineteenth century based on its occupiers' perceived duty "to promote policy initiatives nationwide"); Aaron Wildavsky, *The Two Presidencies*, *TRANS-ACTION*, Dec. 1966, at 7, 7-8 (observing that the post-World War II Presidents rarely failed to realize their major foreign policy objectives).

¹⁵⁶ For a discussion of the "Constitution of Settlement" and the "Constitution of Conversation," see LEVINSON, *supra* note 2, at 19; Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 *B.U. L. REV.* 1159, 1162-68 (2014); Levinson, *supra* note 18, at 1136-40.

¹⁵⁷ See COMM. ON POLITICAL PARTIES, *TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM*, in 44 *AM. POL. SCI. REV. supp.* (1950) (arguing for political parties that offer their members different policy objectives); see also THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY*, at x (1969) (deriding post-New Deal government as an oversized, formless, and impotent mass, incapable of "plan[ning] or achiev[ing] justice").

impossible, Robert Dahl observed, because “[v]irtually no one, and certainly no group of more than a few individuals, is entirely lacking in some influence resources.”¹⁵⁸ Freed from ideological commitments, governing officials and parties were charged with making policies that promoted the interests of most members of most groups in the United States. Daniel Bell insisted that ideological politics was anachronistic in light of “the rough consensus among intellectuals on political issues: the acceptance of a Welfare State; the desirability of decentralized power; a system of mixed economy and of political pluralism.”¹⁵⁹ Courts that decided cases on constitutional principle provided an appropriate balance to pragmatic officials and parties. Prominent law Professor Henry M. Hart, Jr. declared:

[The Supreme Court] is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law.¹⁶⁰

The constitutional order at mid-century was successful both in operation and transformation. Constitutional commitments, institutions, and culture were reasonably well aligned, even though the constitutional order of 1868 had clearly malfunctioned. In sharp contrast to the Republican founders of that constitutional order, Americans in the twentieth century were able to transform a malfunctioning constitutional order peacefully. The transition was not smooth or in one piece. Transitions never are. Still, neither the constitutional text drafted in 1789, most notably the provisions on constitutional amendment, nor the remains of the constitutional order of 1868 proved an iron cage making impossible an American escape from what many early-twentieth-century progressives thought was an increasingly dysfunctional constitutional order.

Americans successfully transformed their constitutional order during the twentieth century in part because the way the Constitution of 1868 malfunctioned facilitated the creation of the Constitution of 1937. The Constitution of 1868 was designed to entrench the rule of a Republican Party committed to reconstructing the former Confederate states in the image of the free labor north.¹⁶¹ The crucial provisions of the Constitution were Sections 2 and 3 of the Fourteenth Amendment, which Thaddeus Stevens maintained would guarantee that southerners would influence national politics only if persons of color gained the ballot.¹⁶² In practice, neither Section 2 nor Section

¹⁵⁸ ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY 228 (2d ed. 2005).

¹⁵⁹ DANIEL BELL, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES 402-03 (rev. ed. 1962).

¹⁶⁰ Henry M. Hart, Jr., *The Supreme Court 1958 Term: Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

¹⁶¹ See *supra* notes 140-45 and accompanying text.

¹⁶² See CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865) (statement of Rep. Stevens).

3 influenced American constitutional development,¹⁶³ and many Republicans soon developed priorities other than racial equality.¹⁶⁴ The result was that, by the turn of the twentieth century, a constitutional order designed to be operated by the legitimate party of the people who remained loyal during the Civil War was already being operated by two nonideological parties. The way in which partisan competition evolved in the late nineteenth century meant that constitutional reformers in the twentieth century did not have to undermine the dominant structure of constitutional politics before transforming the constitutional order. They had no cats to bell. Theirs was the simpler task of transforming constitutional institutions so that the Constitution would operate better in a political universe already structured by two nonideological parties.

III. THE VIEW FROM THE PRESENT

Americans at the turn of the twenty-first century are trying to operate with two ideological parties a constitutional order that New Dealers designed to be operated by two nonideological parties. The Constitution of 1937 functioned better and for a longer period of time than the Constitution of 1868, but New Dealers proved no more successful than the Framers or Reconstruction Republicans at permanently entrenching a particular constitutional politics. American partisan politics began to polarize during the 1970s. By the end of the century, the liberal Republicans and conservative Democrats of the New Deal/Great Society Era were an exotic, if not extinct, species. Such constitutional institutions and practices as multiple veto points and judicial supremacy, which functioned well when the constitutional order was structured by two nonideological parties, more often facilitated than alleviated the worst tendencies of the two polarized parties. These practices that helped stabilize a

¹⁶³ GEORGE S. BOUTWELL, *THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY* 389 (1895) (“[T]he last sentence of section two of the Fourteenth Amendment is inoperative wholly There are no longer any persons living on whom the provisions of section three can operate.”); George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 *FORDHAM L. REV.* 93, 124 (1961) (“There never has been a successful implementation of the full provisions of section 2 of the fourteenth amendment.”); see also Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 *GEO. L.J.* 259, 260 (2004) (“[N]o discriminating state lost even a single seat in the House of Representatives when Congress reapportioned itself.”).

¹⁶⁴ See CHARLES W. CALHOUN, *CONCEIVING A NEW REPUBLIC: THE REPUBLICAN PARTY AND THE SOUTHERN QUESTION, 1869-1900*, at 1-4 (2006) (describing Republicans’ failed efforts “to salvage the republican experiment in the South” when “[a]ttitudes and public concerns . . . shifted” in the late nineteenth century); STANLEY P. HIRSHSON, *FAREWELL TO THE BLOODY SHIRT* 17 (Quadrangle Paperback, reprt. 1968) (“Fundamentally, this book is concerned with how and why the Republican party, which after the Civil War passed numerous laws and set up many organizations to aid the Southern Negro, deserted the colored man by the 1890’s.”).

functional New Deal constitutional regime by promoting pluralist bargaining presently constitute severe barriers to transforming the dysfunctional contemporary constitutional order.

A. *A Dysfunctional Constitutional Story*

Contemporary constitutional politics is haunted by two related phenomena that did not challenge the mid-twentieth-century regime.¹⁶⁵ The first is elite polarization.¹⁶⁶ During the Great Society, on a great many constitutional questions, Republican and Democratic elites had more in common with each other than Republican patricians did with Republican plebeians and Democrat patricians did with Democratic plebeians.¹⁶⁷ At present, Republican and Democratic elites are less likely to agree with each other on basic issues than are less well educated and less affluent Republicans and Democrats.¹⁶⁸ The second is conflict extension.¹⁶⁹ Elites and ordinary members of each party are more likely to disagree with members of the other party on more issues than at any time in the recent past. Knowing that someone was for deregulation in 1960 did not enable one to predict that person's views on racial integration. Persons who favor lower taxes in 2013, by comparison, are far more likely to oppose affirmative action and favor torturing terrorists than those who believe in a more progressive tax system.¹⁷⁰

¹⁶⁵ See Graber, *supra* note 147, at 684-704.

¹⁶⁶ *Id.* at 685, 695 (describing how a general consensus among Democratic and Republican elites due to their elevated financial status facilitated liberal decisionmaking in the Warren Court, while the modern elites, by contrast, "have less in common with each other than do ordinary Democrats and Republicans").

¹⁶⁷ See Herbert McClosky, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361, 364-66 (1964) (finding a broad consensus among "political influentials" on the values of governance that does not exist when one extends the statistical inquiry to include the general electorate).

¹⁶⁸ See Morris P. Fiorina & Matthew S. Levendusky, *Disconnected: The Political Class Versus the People*, in 1 RED AND BLUE NATION?: CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS 49, 51-52 (Pietro S. Nivola & David W. Brady eds., 2006) (indicating that "American politics today finds a polarized political class" that is knowledgeable and ideologically driven, which is "competing for the support of a much less polarized electorate" that is less knowledgeable and "largely nonideological").

¹⁶⁹ See Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and "Conflict Extension" in the American Electorate*, 46 AM. J. POL. SCI. 786-87 (2002) (describing party identifiers' extension of "party conflict" into the three main "domestic issue agendas").

¹⁷⁰ See Graber, *supra* note 147, at 697 ("On almost every issue surveyed, the greatest percentage of respondents taking the most conservative position were from the most affluent and highly educated group of Republicans and the greatest percentage of respondents taking the most liberal position were from the most affluent and highly educated group of Democrats.").

The baneful influence of elite polarization and conflict extension is amply documented elsewhere and by other contributions to this Symposium,¹⁷¹ but both political commentators and constitutional reformers often fail to connect or misconnect crucial dots. The American constitutional experience suggests that present constitutional ills are neither purely a consequence of outdated constitutional provisions as constitutional reformers suggest¹⁷² nor of polarization as political commentators maintain.¹⁷³ Such malfunctions as the failure to staff the federal judiciary and legislative gridlock result from a misalignment between constitutional commitments, constitutional institutions, and the constitutional culture. The problem is not polarization or the Constitution in isolation, but that polarized parties cannot operate effectively the Constitution of 1937.

The process for staffing the federal judiciary provides a simple illustration of how the nonideological parties of the mid twentieth century could more successfully operate the Constitution of 1937 than the polarized parties at present. A general consensus exists that the contemporary confirmation process is a “mess,” both because elected officials are unable to fill lower federal court vacancies for long periods of time and because Supreme Court confirmation hearings are more prone to grandstanding than enlightenment.¹⁷⁴ None of these problems substantially hindered the confirmation process during

¹⁷¹ See SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 19-27 (2003) (describing the impact of party and preference polarization on political stalemate, and explaining the ideological polarization in Congress along these lines); THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK*, at x (2006) (“[T]he growing ideological polarization of the parties, the transformation of intense partisanship into virtually tribal politics . . . contributed to a climate on Capitol Hill that we found unsettling and destructive.”). From this Symposium, see Jack M. Beermann, *The New Constitution of the United States: Do We Need One and How Would We Get One?*, 94 B.U. L. REV. 711 (2014); Yasmin Dawood, *Democratic Dysfunction and Constitutional Design*, 94 B.U. L. REV. 913 (2014); Douglas Kriner & Andrew Reeves, *The Electoral College and Presidential Particularism*, 94 B.U. L. REV. 741 (2014); Melnick, *supra* note 59; Stephen Skowronek, *Twentieth-Century Remedies*, 94 B.U. L. REV. 795 (2014).

¹⁷² See, e.g., LEVINSON, *supra* note 2, at 385-93.

¹⁷³ See, e.g., MANN & ORNSTEIN, *supra* note 171, at 11-12.

¹⁷⁴ See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS*, at ix-x (1994) (discussing the shortcomings of the modern confirmations process, particularly how that process abandons rational critique in favor of rhetorical lambasting, its failure to consider the potential in an intellectually complex public servant, and its requirement that nominees disclose their positions on controversial issues prior to confirmation); MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 6-7 (1994) (“The current [confirmation] process is disorderly, contentious, and unpredictable.”); David Savage, *Roberts Urges End to Partisan Stalling*, L.A. TIMES, Jan. 1, 2011, at AA2 (“[T]he Senate approved only 60 of President Obama’s court nominees in the last two years. That was the lowest total for a new president in four decades.”).

the New Deal/Great Society Era.¹⁷⁵ The reason seems simple. Historically, both partisanship and ideology correlate strongly with Senate support for a presidential judicial nominee.¹⁷⁶ In a constitutional order structured by two nonideological parties, conflict over judicial nominees is unlikely because presidential judicial nominees tend to be supported by most members of their party and by those members of the rival party who share the President's ideological orientation. Earl Warren was supported both by Republicans and liberal Democrats.¹⁷⁷ When constitutional politics is structured by ideological parties, conflict over judicial nominees is far more likely because very few members of the rival party share the President's ideological orientation. Justices Samuel Alito and Elena Kagan faced more opposition than any member of the Warren Court because, by the twenty-first century, virtually all of the partisan rivals of the President were also the ideological rivals of the President.¹⁷⁸

The filibuster provides an even clearer example of a practice that facilitated constitutional commitments during the New Deal/Great Society Era while contributing to the present dysfunctional order. Gregory Koger's history of obstruction in the Senate claims that, before the late 1960s, Senators seeking to expand the number of interests served by proposed legislation most often used filibusters as bargaining devices.¹⁷⁹ Race aside,¹⁸⁰ the filibuster as practiced often contributed to the pluralist bargaining processes central to the

¹⁷⁵ See SILVERSTEIN, *supra* note 174, at 3 (“[F]or almost seventy years the confirmation process was distinguished by a strong presumption in favor of deference to presidential prerogative . . .”).

¹⁷⁶ LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 106-13 (2005) (“The partisan climate surrounding the Senate’s deliberations and the candidate’s ideology also play roles, and critical ones at that.” *Id.* at 106.).

¹⁷⁷ See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II*, at 201-02 (5th ed. 2008) (recounting Chief Justice Warren’s confirmation process, which was initially stalled by a few “conservative Southern Democrats” but concluded with unanimous support for his confirmation).

¹⁷⁸ See *id.* at 321-22 (describing wholesale Democratic opposition to the nominee put forward by Republican President George W. Bush, resulting from both party loyalty and ideological aversion); Paul Kane & Robert Barnes, *Senate Confirms Kagan as Justice*, WASH. POST, Aug. 6, 2010, at A1 (reporting that Justice Kagan, nominated by Democratic President Obama, received the support of only five Republicans, while the remaining conservatives remained skeptical of her commitment to “the rule of law” (internal quotation marks omitted)).

¹⁷⁹ GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE* 4-5 (2010) (claiming that “classic filibustering was a *bargaining game*” and providing an example of one such filibuster in which Senator La Follette and a group of like minded Senators sought to block a bill that “they considered a gift to the financial elite”).

¹⁸⁰ “Other than that, Mrs. Lincoln, how did you like the show?”

constitutional order at mid-century.¹⁸¹ When proponents of racial equality came to favor their position (almost) as strongly as white supremacists, the filibuster in the Senate was overcome, and strong bipartisan majorities passed civil rights legislation.¹⁸² At present the filibuster more often serves as a means to prevent any legislation from passing.¹⁸³ Republicans during debates over health care, for example, more often sought to thwart the Clinton and Obama Administrations than attempted to seek a more compromised plan. William Kristol spoke for many partisans when he insisted that Democratic healthcare plans should be opposed “sight unseen” as “a serious political threat to the Republican party.”¹⁸⁴

Other veto points have the same capacity as the filibuster to facilitate or impede constitutional commitments. All practices that permit legislative minorities to obstruct the legislative process foster more pluralistic legislative inputs and outputs under certain conditions of political competition, and prevent legislatures from accomplishing anything else under other circumstances of political competition. Keith Krehbiel analyzes the presidential veto and documents why that and related mechanisms promote compromise in some situations and gridlock in others.¹⁸⁵ Krehbiel’s analysis highlights why one cannot determine whether a constitutional order has too many veto points with an abacus or computer. The numbers do not matter. What matters is whether constitutional politics is structured in ways that provide incentives for political actors to use veto points as bargaining strategies or for blocking purposes.¹⁸⁶ American politics is presently dysfunctional because the same veto points that may have promoted more

¹⁸¹ See KOGER, *supra* note 179, at 5 (2010) (“[C]lassic filibustering was a bargaining game.”).

¹⁸² See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* 142-44 (1990) (recounting the mounting factors that enabled civil rights leaders to defeat the Southern Democratic filibuster, including increased popular pressure and “the superior organization of the Senate leadership”).

¹⁸³ See Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 *CONN. L. REV.* 1041, 1043-46 (2011) (discussing the Senate’s routine use of the filibuster to prevent legislative action).

¹⁸⁴ LEVINSON, *supra* note 1, at 65 (quoting William Kristol); see also LAWRENCE R. JACOBS & THEDA SKOCPOL, *HEALTH CARE REFORM AND AMERICAN POLITICS* 63-64 (rev. ed. 2012) (explaining that Republicans used “whatever rules were available to slow the legislative process” to thwart Democratic healthcare reform).

¹⁸⁵ See KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 229-36 (1998) (theorizing that the presidential veto “contributes to policy stability . . . in instances in which the status quo is moderate . . . and it dampens the degree of convergence to the median legislator’s ideal point when the status quo lies just outside the gridlock interval on the president’s side of the ideological spectrum”).

¹⁸⁶ *Id.* at 230-31 (suggesting that the number of veto points and potential for gridlock are inconsequential because our system, when stymied by gridlock, is appropriately “responsive and central tending”).

consensual legislation fifty years ago are now more often means for preventing governing officials from accomplishing such basic constitutional purposes as staffing the judiciary and funding basic services.

Veto points play two important roles in contemporary American constitutional politics. First, and in some ways less important, they freeze politics. Americans cannot agree on a budget or staff vital federal agencies because all parties to debates have the ability to block proposals by the other and no one has an incentive to compromise.¹⁸⁷ Second, and more important, the veto points that made sense in an earlier constitutional order help prevent the transition to a more functional constitutional order. Veto points raise the bar for altering constitutional politics, a bar neither party has been able to hurdle. The supermajoritarian requirements of Article V are “the most important bars of our constitutional iron cage”¹⁸⁸ at present, but only because Americans in 2013, as opposed to Americans in 1963, are incapable of achieving a consensus on any formal, semiformal, or informal constitutional change.

B. *Moving On*

Constitutional reformers at the turn of the twenty-first century face a more daunting challenge than did their predecessors 100 years ago. The collapse of the Constitution of 1868 left the field open for nonideological parties to restructure the constitutional universe in their image. The absence of any ideological party facilitated efforts to transform constitutional institutions and commitments to fit more closely with and entrench the existing structure of constitutional politics. The resulting constitutional reforms of the New Deal were achieved with minimal social disruption because they largely preserved the structure of partisan competition in the United States. The collapse of the Constitution of 1937 creates nearly insuperable obstacles to various projects of constitutional reform. Levinson and his supporters seek constitutional changes that will undermine rather than further entrench the existing structure of constitutional politics. Rather than realign the constitutional order to fit better the existing structure of partisan competition, they hope for an entirely new regime. Americans have never experienced this form of revolutionary constitutional change. Their constitutional experience suggests that whatever constitutional reform takes place in the near future is more likely to be preservative. The most likely probability is that constitutional reforms will fashion a new constitutional order designed to entrench the more successful of the polarized parties and to facilitate governance by that polarized party.

Successful constitutional reform in the United States has historically been initiated and managed by the dominant political forces in society. Republicans

¹⁸⁷ See BINDER, *supra* note 171, at 12-33 (explaining that changes in the Senate’s structure, the balance of power between the Senate, the House, and the rise of politically polarized parties created tension points that contributed to legislative deadlock).

¹⁸⁸ LEVINSON, *supra* note 1, at 167.

during the Civil War drafted and ratified the post–Civil War amendments.¹⁸⁹ Liberal Democrats and liberal Republicans were responsible for constitutional reform during the New Deal Era.¹⁹⁰ George Washington was part of the national elite who replaced the Articles of Confederation with the Constitution of the United States.¹⁹¹ That Constitution was ratified in large part because the most politically prominent Americans supported the text during the late eighteenth century.¹⁹²

The goal of most successful constitutional reforms in the United States is to entrench the existing structure of political competition and align other constitutional practices so that the dominant political forces can operate the constitutional order more effectively. Republicans during Reconstruction regarded their coalition as the legitimate party of the loyal people.¹⁹³ Their constitutional reforms sought to fashion a constitutional order that they believed would entrench the legitimate party of the loyal people and enable those people to govern more effectively.¹⁹⁴ Liberal Republican and Democrats during the twentieth century celebrated “the end of ideology.”¹⁹⁵ Their constitutional reforms sought to fashion a constitutional order that they believed would entrench two nonideological parties and promote liberal pluralism. The Framers who scrapped the Articles of Confederation were members of the dominant national elite who fretted about the quality of the representatives elected to local legislatures and the quality of legislation such legislators produced.¹⁹⁶ Their constitutional reforms sought to entrench rule by

¹⁸⁹ GILLMAN ET AL., *supra* note 41, at 250 (discussing the instrumental role that Republicans played in drafting and enacting the post–Civil War amendments).

¹⁹⁰ See GILLMAN ET AL., *supra* note 30, at 480 (explaining that, during the New Deal/Great Society Era, “the liberal spirit in the United States was bipartisan,” and that the “Supreme Court was a bastion of bipartisan constitutional liberalism”).

¹⁹¹ See Stanley M. Elkins & Eric McKittrick, *Youth and the Continental Vision*, reprinted in *ESSAYS ON THE MAKING OF THE CONSTITUTION* 213, 241-45 (Leonard W. Levy ed., 2d ed. 1987); see also CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 123-24 (2008) (observing that revolutionary leaders struggled in the post-revolutionary era to maintain the elite class of leadership that they envisioned would govern the United States).

¹⁹² See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 134-39 (1996) (acknowledging the influence of President George Washington and Benjamin Franklin on the ratification debates).

¹⁹³ See *supra* notes 140-45 and accompanying text.

¹⁹⁴ See Graber, *supra* note 37, at 6.

¹⁹⁵ See *supra* note 159 and accompanying text (arguing that the mid-twentieth-century parties were nonideological, with elites in both parties agreeing on major issues).

¹⁹⁶ See James Madison, *Vices of the Political System of the United States* (Apr. 1787), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 57, 57-65 (Marvin Meyers ed., rev. ed. 1981) (enumerating the new republic’s vices, many of which lay with state legislatures and their elected officials).

virtuous national elites who could remain above the partisan strife.¹⁹⁷ These new constitutional orders do not function as expected for more than a generation, if that. Nevertheless, most (temporarily) successful exercises of constitutional reform in the United States are better described as “hegemonic preservation,” as efforts by existing elites to realign politics to preserve a favorable constitutional politics,¹⁹⁸ than as means for undermining the existing structure of political competition.

This history suggests that whatever constitutional reform takes place in the foreseeable future will be initiated and managed by one or both polarized parties. Rather than a means for escaping the structure of contemporary constitutional politics, successful constitutional reform will consist of the combination of formal, semiformal, and informal constitutional changes necessary for one or both ideological parties to operate the constitutional order effectively. No good reason exists for thinking the partisan cats will be belled. Both the present Republican and the present Democratic Party are too entrenched to go away, merely because both are incapable of cooperating with the other to the degree necessary to operate the Constitution of 1937.¹⁹⁹ Those mice still committed to transforming the constitutional order may be limited to determining which cat’s project of constitutional reform they will support.

Some possibility exists that constitutional reforms in the near future will moderate the course of American constitutional politics. Democratic and Republican Party elites, aware that gridlock is inhibiting the realization of basic constitutional purposes, may take the steps necessary to strengthen the most centrist institutions and practices in the American constitutional order. For almost a generation, a Supreme Court controlled by surviving moderates was able to produce acceptable compromises on some issues.²⁰⁰ Perhaps that practice can be continued and other centrist institutions built up, although prospects are unlikely.²⁰¹

The more probable constitutional changes in the near future will occur after one party gains temporary crucial control over all crucial constitutional institutions and takes immediate steps to restructure the constitutional order in its image. Such politicians as Senator Ted Cruz are more likely to influence the

¹⁹⁷ See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 253-59 (1992) (explaining that the Federalists envisioned a federal government composed of virtuous “disinterested umpires,” who were above local interests, and who “promot[ed] an exclusively public sphere of activity in government,” as opposed to engaging in “interest mongering”).

¹⁹⁸ See HIRSCHL, *supra* note 25, at 11.

¹⁹⁹ See *supra* notes 165-71 and accompanying text.

²⁰⁰ See H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 *CONST. COMMENT.* 641, 688 (2004) (describing the Warren Court as “ending the sectional nature of constitutional disputes”).

²⁰¹ See Graber, *supra* note 147, at 704-12 (predicting that politicians will experience an ideological swing on major issues in the future, rather than fostering the continuance or centering of a polarized status quo).

shape of this new constitutional universe²⁰² than are the reformers who hope for those constitutional changes that will reduce the influence of polarizing politicians on the future course of American constitutionalism. The model for this constitutional change will more likely be 1868, when Republicans sought constitutional reforms that would entrench their party and their party's constitutional commitments, rather than 1937, when constitutional reform was a bipartisan project. If in fact 1868 is the model, then the path to constitutional change is likely to be far bloodier and repressive than the course anticipated by those reformers who hope to bell the partisan cats.

²⁰² See, e.g., Erik Eckholm, *A Republican Voice with Tea Party Mantle and Intellectual Heft*, N.Y. TIMES, Aug. 1, 2012, at A1.