
A SYMPOSIUM ON JACK M. BALKIN'S *THE CYCLES OF CONSTITUTIONAL TIME*

HOW TO DO CONSTITUTIONAL THEORY WHILE YOUR HOUSE BURNS DOWN

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ABSTRACT

The events of the past five years, culminating in the 2020 election and the January 6, 2021, attack on the U.S. Capitol, pose a new and urgent set of questions for American constitutional theory.

The first is constitutional diagnosis: What has gone wrong with our constitutional system? The second is constitutional repair: What can we do in the short run to repair the damage that has already occurred to our democracy?

The third is constitutional reform: What reforms are necessary, either through constitutional amendment or sub-constitutional means, to strengthen our constitutional democracy for the long run? The fourth is constitutional maintenance: What institutions can we shore up or create to maintain our constitutional democracy as it meets the challenges ahead?

These questions emerged for many different reasons: elite and popular polarization, the unraveling of the New Deal settlement, increasing constitutional dysfunction, democratic backsliding, and accelerating constitutional rot.

The Cycles of Constitutional Time tries to address these questions, using cycles as a heuristic to understand the interaction of political agency and political structure that generates constitutional development over time. Because its analysis ends in early 2020, this Essay discusses developments since the book was written: the old order's attempts to maintain political power through minority rule, and what it would take for a new constitutional regime to form. It also briefly outlines three possible paths of future constitutional development.

The cycle of rot and renewal in American constitutional history is not an iron law of politics. Rather, it is a sign of the remarkable durability of our

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constitutional system—that it keeps bouncing back from the forms of democratic decay that have done in many other republics before it.

Yet this durability comes with a price. It makes the system unwieldy and prevents a great deal of potentially valuable change, including the very changes that might be necessary to reverse the growing decay in our institutions. A central question for American constitutional theory is whether our system's resistance to rapid change will finally be its undoing, or whether pent-up frustrations will produce mobilizations that successfully renew American democracy.

CONTENTS

INTRODUCTION	1726
I. A DISTURBANCE IN THE FORCE.....	1734
A. <i>Political Polarization</i>	1734
B. <i>The Unraveling of the New Deal Settlement</i>	1737
C. <i>Constitutional Dysfunction</i>	1741
D. <i>Democratic Backsliding</i>	1742
II. CONSTITUTIONAL THEORY AS THE STUDY OF REGIMES AND GENERATIONS	1743
III. CYCLES AS THE INTERSECTION OF POLITICAL STRUCTURE AND POLITICAL AGENCY	1745
A. <i>The Cycle of Regimes</i>	1746
B. <i>Polarization and Depolarization</i>	1750
C. <i>Constitutional Rot and Renewal</i>	1756
IV. A PIVOTAL MOMENT	1758
A. <i>Signs of a New Regime?</i>	1762
CONCLUSION: THREE PATHS FORWARD	1767

INTRODUCTION

The prospect of the death of American democracy tends to concentrate the mind.

In 2016, something happened that the Framers of our Constitution feared would eventually come to pass and tried their best to prevent. The United States elected a demagogue, Donald Trump, to the presidency.¹ Ironically, he came to power courtesy of the Electoral College, which the Framers hoped would prevent demagogues from gaining control of the presidency.²

In order to stay in power, Trump attempted to coerce a foreign power, Ukraine, to smear his likely opponent in the 2020 election, former Vice President Joe Biden.³ Trump's plan was discovered, and he was impeached, but the members of his party in the Senate refused to convict him.⁴ By that point he had created a powerful cult of personality and the majority of his fellow Republicans were afraid to cross him lest his avid supporters throw them out of office. Trump's Democratic opponents warned that if Trump were not stopped, he would try again to undermine the upcoming 2020 election in order to stay in power.⁵

And so he did. Throughout the campaign Trump sought to undermine confidence in the electoral system. He argued that voting by mail—the method

¹ JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* 55 (2020) (explaining why Trump fits the classic model of the demagogue) [hereinafter BALKIN, *CYCLES*]; see THE FEDERALIST NO. 1 (Alexander Hamilton) (“[O]f those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.”); see also Frank O. Bowman, III, *What the Founders Would Have Done with Trump*, WASH. MONTHLY (Jan. 18, 2021), <https://washingtonmonthly.com/2021/01/18/what-the-founders-would-have-done-with-trump/> [https://perma.cc/2KC9-C628] (“The founders cautioned against demagogues constantly . . . the idea at the bottom of the insult was the Framers’ conclusion, based on the study of history ancient and modern, that republics were peculiarly vulnerable to demagogues—men who craved power for its own sake, and who gained and kept it by dishonest appeals to popular passions.”).

² See THE FEDERALIST NO. 68 (Alexander Hamilton) (arguing that having the public select the President indirectly through choosing electors “will be much less apt to convulse the community with any extraordinary or violent movements,” and will prevent “cabal, intrigue, and corruption”).

³ BALKIN, *CYCLES*, *supra* note 1, at 58-60.

⁴ *Id.* at 59-60.

⁵ Tom McCarthy, *Trump Impeachment Trial: Democrats Warn Trump ‘Will Do It Again’ if Acquitted*, GUARDIAN (Feb. 3, 2020, 3:57 PM), <https://www.theguardian.com/us-news/2020/feb/03/trump-impeachment-trial-closing-arguments>; Christina Wilkie, Kevin Breuninger & Yelena Dzhanova, *Trump Impeachment Trial: Closing Arguments Focus on 2020 Presidential Election*, CNBC (Feb. 3, 2020, 10:19 PM), <https://www.cnbc.com/2020/02/03/trump-impeachment-trial-closing-arguments-focus-on-2020-election.html> [https://perma.cc/WM4E-4CPL].

he himself used—would lead to massive voter fraud.⁶ He asserted that the only way he could lose is if the election were rigged against him.⁷ Despite his efforts, he lost the election in November 2020.

The election was conducted fairly, and his own attorney general acknowledged that there was no evidence of significant voter fraud that would change the result.⁸ But Trump refused to concede the legitimacy of his defeat. He ramped up his propaganda campaign to sow widespread distrust in the country's electoral system.⁹ He and his allies brought a series of unsuccessful lawsuits in the courts.¹⁰ He tried to coerce local election officials to change the results in his favor.¹¹ He pressured the Justice Department to declare the election corrupt without any basis in fact in order to help him and his Republican allies

⁶ Nicholas Riccardi, *AP Fact Check: Trump's Big Distortions on Mail-in Voting*, ASSOCIATED PRESS (Sept. 17, 2020), <https://apnews.com/article/virus-outbreak-election-2020-ap-fact-check-elections-voting-fraud-and-irregularities-8c5db90960815f91f39fe115579570b4> [<https://perma.cc/A9DK-DUJX>] (describing Trump's "monthslong campaign against mail-in voting"); Vera Bergengruen & Lissandra Villa, *How Donald Trump's Misinformation Campaign Against Mail-in Voting Is Undermining Faith in Democracy*, TIME (Sept. 10, 2020, 6:36 AM), <https://time.com/5887438/trump-mail-in-voting/> (reporting on Trump's attempts to link mail-in voting to voter fraud).

⁷ Morgan Chalfant, *Trump: 'The Only Way We're Going to Lose This Election Is if the Election Is Rigged'*, HILL (Aug. 17, 2020, 7:22 PM), <https://thehill.com/homenews/administration/512424-trump-the-only-way-we-are-going-to-lose-this-election-is-if-the> [<https://perma.cc/LZ66-4BR7>].

⁸ Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, ASSOCIATED PRESS (Dec. 1, 2020), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>.

⁹ Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, WASH. POST (Mar. 11, 2021, 7:10 PM), <https://www.washingtonpost.com/elections/interactive/2020/election-integrity/> (listing Trump's false claims in media and courts); Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg & Michael S. Schmidt, *77 Days: Trump's Campaign to Subvert the Election*, N.Y. TIMES, Feb. 1, 2021, at A1; Larry Buchanan, Karen Yourish, Ainara Tiefenthäler, Jon Huang & Blacki Migliozi, *Lie After Lie: Listen to How Trump Built His Alternate Reality*, N.Y. TIMES (Feb. 9, 2021), <https://www.nytimes.com/interactive/2021/02/09/us/trump-voter-fraud-election.html>.

¹⁰ Rutenberg et al., *supra* note 9.

¹¹ Julia Jester, *'You'll Be Praised': Audio of Trump Call with Georgia Elections Investigator Offers New Details*, NBC NEWS (Mar. 15, 2021, 8:34 PM), <https://www.nbcnews.com/politics/elections/you-ll-be-praised-audio-trump-call-georgia-elections-investigator-n1261159> [<https://perma.cc/E2JC-TWRT>]; Amy Gardner, *'I Just Want to Find 11,780 Votes': In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, WASH. POST (Jan. 3, 2021, 9:59 PM), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html [<https://perma.cc/F2PJ-CP4D>] ("The Washington Post obtained a recording of the conversation in which Trump alternately berated Raffensperger, tried to flatter him, begged him to act and threatened him with vague criminal consequences if the secretary of state refused to pursue his false claims, at one point warning that Raffensperger was taking 'a big risk.'" (citation omitted)).

overturn the election result.¹² Eventually he incited a mob to attack the U.S. Capitol to prevent Congress from counting the Electoral College votes and confirming the election of the new President, Joe Biden.¹³ Although the riot had put their own lives and the lives of their colleagues in danger, over half of the Republican delegation in the House and eight Republican Senators continued to try to contest the Electoral College results.¹⁴ Following the insurrection, Trump was impeached a second time, although, once again, the vast majority of his Republican allies in the Senate refused to convict him.¹⁵

The failed attack on the Capitol did not break the demagogue's spell. Quite the contrary, it enhanced his stranglehold over one of the country's two major political parties. A majority of the Republican Party is now in thrall to the demagogue's Big Lie that the 2020 election was stolen.¹⁶ The party is purging

¹² Jeremy Herb, *Trump to DOJ Last December: 'Just Say that the Election Was Corrupt + Leave the Rest to Me,'* CNN (July 31, 2021, 12:41 PM), <https://www.cnn.com/2021/07/30/politics/trump-election-justice/index.html> [https://perma.cc/Q7SB-NYL6] ("Trump pressured [Acting Attorney General] Rosen and [Acting Deputy Attorney General] Donoghue to falsely declare the election 'illegal' and 'corrupt' even after the Justice Department had not uncovered evidence of widespread voter fraud."); Katie Benner, *Trump Pressed Justice Dept. to Declare Election Results Corrupt, Notes Show*, N.Y. TIMES (Aug. 11, 2021), <https://www.nytimes.com/2021/07/30/us/politics/trump-justice-department-election.html> ("President Donald J. Trump pressed top Justice Department officials late last year to declare that the election was corrupt even though they had found no instances of widespread fraud, so he and his allies in Congress could use the assertion to try to overturn the results.").

¹³ Ed Pilkington, *Incitement: A Timeline of Trump's Inflammatory Rhetoric Before the Capitol Riot*, GUARDIAN (Jan. 7, 2021, 12:35 PM), <https://www.theguardian.com/us-news/2021/jan/07/trump-incitement-inflammatory-rhetoric-capitol-riot> [https://perma.cc/F22F-WTJ4]; *Woman Dies After Shooting in U.S. Capitol; D.C. National Guard Activated After Mob Breaches Building*, WASH. POST (Jan. 7, 2021, 12:52 AM), <https://www.washingtonpost.com/dc-md-va/2021/01/06/dc-protests-trump-rally-live-updates/>; Maggie Haberman, *Enraged at Pence, Trump Exhorted Crowd to 'Fight,'* N.Y. TIMES, Jan. 7, 2021, at A16.

¹⁴ Barbara Sprunt, *Here Are the Republicans Who Objected to the Electoral College Count*, NPR (Jan. 7, 2021, 4:26 PM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/07/954380156/here-are-the-republicans-who-objected-to-the-electoral-college-count> [https://perma.cc/34DX-J4MU] (noting that 138 representatives and seven senators objected to the count of electors from Pennsylvania, and 121 representatives and six senators objected to the count of electors from Arizona, with eight senators raising objections to one of the two states).

¹⁵ *Impeachment Trial: Trump Is Acquitted by the Senate*, N.Y. TIMES (Feb. 17, 2021), <https://www.nytimes.com/live/2021/02/13/us/impeachment-trial>; Domenico Montanaro, *Senate Acquits Trump in Impeachment Trial—Again*, NPR (Feb. 13, 2021, 3:52 PM), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967098840/senate-acquits-trump-in-impeachment-trial-again> [https://perma.cc/HHF9-4EVY].

¹⁶ See *Views on the Republican Party's Priorities, Leadership, and Future*, AP-NORC (July 27, 2021), <https://apnorc.org/projects/views-on-the-republican-partys-priorities->

or punishing Republican officials who dare to dispute it.¹⁷ Spurred on by the Big Lie, the party's leaders in the states, now radicalized, are attempting to change the election administration rules in key states to ensure that the party does not lose another presidential election.¹⁸

The danger is not simply more effective forms of voter suppression. It is also the possibility that states will subvert elections by undermining local election officials and handing election administration to partisan actors.¹⁹ The ostensible purpose of these changes to state election laws is that members of the public now

leadership-and-future/ [https://perma.cc/5MBF-3VYA] (reporting that 66% of Republicans believe that Joe Biden was not legitimately elected).

¹⁷ Jill Colvin & Steve Peoples, *Whose 'Big Lie'? Trump's Proclamation a New GOP Litmus Test*, ASSOCIATED PRESS (May 3, 2021), <https://apnews.com/article/politics-campaign-2016-election-2020-government-and-politics-f3428d42d4d3fdfe59c560b6fadbbc70> ("Donald Trump and his supporters are intensifying efforts to shame—and potentially remove—members of their party who are seen as disloyal to the former president and his false claims that last year's election was stolen from him."); Perry Bacon Jr., *The Trumpiest Republicans Are at the State and Local Levels—Not in D.C.*, FIVETHIRTYEIGHT (Feb. 16, 2021, 5:54 AM), <https://fivethirtyeight.com/features/the-trumpiest-republicans-are-at-the-state-and-local-levels-not-in-d-c/> ("Local and state-level Republican parties are sharply attacking and even formally censuring prominent figures in the party like [U.S. Representative Elizabeth] Cheney who have broken with Trump.").

¹⁸ *Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUST. (July 22, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021> [https://perma.cc/G7K5-36QX] ("More than 400 bills with provisions that restrict voting access have been introduced in 49 states in the 2021 legislative sessions.").

¹⁹ See, e.g., Brentin Mock, *How Georgia Could Take over Atlanta's Elections*, BLOOMBERG (Aug. 6, 2021, 3:52 PM), <https://www.bloomberg.com/news/articles/2021-08-06/the-new-era-of-election-subversion> ("Arizona, Kansas, Texas, North Dakota, Montana and a slew of other states have introduced bills this year that either usurp local election powers, or give more discretion to partisan state officials to decide whose votes count."); *id.* ("As . . . in Georgia, such legislation is mostly targeting urban metro areas, or cities with large non-white populations — often one and the same."); *A Democracy Crisis in the Making*, PROJECT DEMOCRACY (June 2021), <https://protectdemocracy.org/project/democracy-crisis-in-the-making/#section-2> [https://perma.cc/W2MX-A7Z4] ("As of early June, there have been at least 216 bills introduced in 41 states that would interfere with election administration."); Richard L. Hasen, Opinion, *Republicans Aren't Done Messing with Elections*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/2021/04/23/opinion/republicans-voting-us-elections.html> ("The message that these actions send to politicians is that if you want a future in state Republican politics, you had better be willing to manipulate election results or lie about election fraud."); Nate Cohen, *Georgia's New Law, and the Risk of Election Subversion*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/04/06/upshot/georgia-election-law-risk.html> [https://perma.cc/J3YT-BHHQ] ("[T]he new Georgia election law . . . creates new avenues for partisan interference in election administration [by] allowing the state elections board, now newly controlled by appointees of the Republican State Legislature, to appoint a single person to take control of typically bipartisan county election boards, which have important power over vote counting and voter eligibility.").

lack confidence in the fairness and integrity of the electoral system, but that very lack of confidence was caused by Trump's and his supporters' propaganda.²⁰

The attack on the Capitol is over. But the lies and propaganda that produced it continue. Recent polls suggest that approximately two-thirds of Republican voters believe that the 2020 election was stolen.²¹ The former number-three Republican in the House of Representatives, Elizabeth Cheney, was booted from her leadership position when she refused to accept the Big Lie; she was replaced with a Trump advocate who alleges that the election was stolen.²² Many Republican leaders are playing along with the lie for political advantage, while others stay silent or are afraid to tell their constituents the truth, for fear that they will be drummed out of office.²³

In 2021, America faces a profound political crisis.²⁴ That crisis offers both danger and opportunity.

²⁰ Rick Klein & Alisa Wiersema, *'Big Lie' Spreads into GOP Efforts to Limit Ballot Access*, ABC NEWS (Mar. 2, 2021, 6:02 AM), <https://abcnews.go.com/Politics/big-lie-spreads-gop-efforts-limit-ballot-access/story?id=76186218> [<https://perma.cc/66Q7-HRRF>] ("[M]any Republicans have found a new talking point: Lack of public trust in the outcome of November's election—trust eroded in part by the 'big lie' about that very election, propagated by former President Donald Trump and other prominent Republicans."); Giovanni Russonello, *No Evidence of Voting Fraud? For the G.O.P., It's No Problem.*, N.Y. TIMES (May 13, 2021), <https://www.nytimes.com/2021/05/13/us/politics/republican-voting-laws.html> ("Having fueled mistrust in elections, Republicans are pointing to voters' fears to justify new voting laws.").

²¹ *Views on the Republican Party's Priorities, Leadership, and Future*, *supra* note 16 (reporting that 66% of voters believe that Joe Biden was not legitimately elected); *Majority Back Capitol Riot Commission*, MONMOUTH UNIV. POLLING INST. (Mar. 17, 2021), https://www.monmouth.edu/polling-institute/reports/MonmouthPoll_US_031721/ [<https://perma.cc/6SAS-CWM6>] ("Among Republicans, nearly two-thirds (65%) maintain Biden's win was due to voter fraud and 29% say they will never accept him as president."); *see also* Press Release, Reuters/Ipsos, *Trump's Coattails* (Apr. 2, 2021), https://www.ipsos.com/sites/default/files/ct/news/documents/2021-04/topline_write_up_reuters_ipsos_trump_coattails_poll_-_april_02_2021.pdf [<https://perma.cc/FS4N-QP3R>] (finding that 38% of Republicans "strongly agree" that the election was stolen from Trump, while 22% "somewhat agree").

²² Catie Edmondson & Nicholas Fandos, *Jeered by G.O.P., Deposed Cheney Issues a Warning*, N.Y. TIMES, May 13, 2021, at A1.

²³ Calvin Woodward, *Trump's 'Big Lie' Imperils Republicans Who Don't Embrace It*, ASSOCIATED PRESS (May 9, 2021), <https://apnews.com/article/michael-pence-donald-trump-election-2020-government-and-politics-0c07947f9fd2b9911b3006f0fc128ffd> ("Allegiance to a lie has become a test of loyalty to Donald Trump and a means of self-preservation for Republicans.").

²⁴ Sanford Levinson and I distinguish political crises from constitutional crises. Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 712-15 (2009). Political crises are struggles for power within a constitutional system. *Id.* at 711. Constitutional crises are struggles for power in which the Constitution is about to fail at its task of keeping struggles for power within the constitutional system. *Id.* at 714-15. The insurrection of January 6, 2021, appears to meet Levinson's and my criteria for the third type

The danger is that the demagogue, or someone like him, will make a comeback. The country will slide into a soft authoritarianism, an increasingly corrupt form of government propped up by propaganda, conspiracy theories, and cultural warfare. Although the outward forms of constitutional democracy will be preserved, the actual norms of democracy will continue to decay. America's already imperfect democracy will become ever more flawed, and its two-and-a-half century experiment in self-governance will go bankrupt, as Ernest Hemingway once put it, "[g]radually and then suddenly."²⁵

But the political crisis also presents an opportunity: a repudiation of the demagogue and his brand of politics, a renewal of American democracy, a second Progressive Era of reform, and a Third Reconstruction.²⁶ It is also possible that neither of these things will happen. Instead, the United States will be locked in a twilight struggle over the terms of American democracy that will continue for many years, with no clear victory for any side. Social upheaval will continue, and possibly even more political violence like the insurrection of January 6. In that case, the health of our democracy will also continue to deteriorate.

What kind of constitutional theory is appropriate to this moment? Should constitutional scholars go on in much the same way as before, focusing on the history of this or that clause, or commenting incisively on the doctrinal meanderings of the United States Supreme Court? Should they try to offer yet another theory of judicial review that will finally resolve the counter-majoritarian difficulty? Or should they change the subject, and ask a different set of questions about our constitutional system?

The Cycles of Constitutional Time ("Cycles") offers to change the subject. It is an attempt to write constitutional theory while the house is burning down.

In a period like the present, American constitutional theory must take on an additional set of questions:

First, what exactly has gone wrong with our constitutional system? Why does our politics seem so dysfunctional? How have the institutions of self-government—including institutions of civil society like the public sphere—been deformed or damaged? Do we need a new constitution or is the problem one of political culture and institutions?

Second, what can we do in the short run to repair the damage that has already occurred to our democracy?

Third, what reforms can we put in place, whether through constitutional amendment or sub-constitutional means, to strengthen our constitutional democracy for the long run?

of constitutional crisis—when people go beyond mere protest at government policy and engage in insurrectionary violence. *Id.* at 714, 738-46. If so, the question is whether the constitutional crisis that began on January 6th is over.

²⁵ ERNEST HEMINGWAY, *THE SUN ALSO RISES* 109 (1926).

²⁶ BALKIN, *CYCLES*, *supra* note 1, at 63-64, 171.

Fourth, what institutions can we shore up or create to maintain our constitutional democracy as it meets the challenges ahead?

We might call these the questions of *constitutional diagnosis*, *constitutional repair*, *constitutional reform*, and *constitutional maintenance*.

Cycles is primarily a work of constitutional diagnosis, and this Essay also focuses primarily on diagnostic questions. In my recent book with Sanford Levinson, *Democracy and Dysfunction*,²⁷ the two of us discuss proposals for constitutional repair and reform.²⁸ In other work I've written about how to regulate social media to protect democracy.²⁹ That is an issue of constitutional maintenance. Jim Fleming and Linda McClain's essay on civic education in this Symposium is also an essay on constitutional maintenance.³⁰

American election law scholars have been focusing on structural features of democracy for many years.³¹ They have been pleading with the country to reform our representational and campaign finance systems, especially in the run up to the 2020 election.³² There is also a burgeoning literature on proposals for

²⁷ SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION* (2019).

²⁸ *Id.* at 12-14, 176-180, 199-203.

²⁹ Jack M. Balkin, How to Regulate (and Not Regulate) Social Media, Address Before The Association for Computing Machinery Symposium on Computer Science and Law (Oct. 28, 2019), in KNIGHT INST. OCCASIONAL PAPER SERIES (Mar. 25, 2020), <https://knightcolumbia.org/content/how-to-regulate-and-not-regulate-social-media> [<https://perma.cc/84TP-SJDF>].

³⁰ See generally Linda C. McClain & James E. Fleming, *Civic Education in Circumstances of Constitutional Rot and Strong Polarization*, 101 B.U. L. REV. 1771 (advocating educational reforms to instill civic virtue and develop capacities for participation in self-government).

³¹ E.g., SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1-3 (5th ed. 2016); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 806 (2014); Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7, 7 (2010); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 34 (2004); Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998).

³² E.g., RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* 12 (2020).

court reform.³³ Chapter 11 of *Cycles* contributes to this literature.³⁴ Finally, discussions of constitutional diagnosis, repair, reform, and maintenance are a staple of comparative constitutionalism. Americans are now catching up with work done in and about other countries.³⁵

Some American constitutional theory indirectly addresses the questions of constitutional diagnosis, repair, reform, and maintenance. For example, constitutional scholarship can help us understand what we can do outside of amendment and what we cannot.³⁶ It can also argue for changes in legal doctrine that make constitutional repair, reform, and maintenance possible or more effective. But the moment calls for different approaches, and law professors have begun to respond.

Part I of this Essay describes some of the deeper trends that have raised these new questions for American constitutional theory. Part II explains some of the tools, concepts, and approaches one needs to do diagnostic work. Part III describes the developmental ideas at the heart of *The Cycles of Constitutional Time*—the rise and fall of regimes, the increase and decrease in political polarization, and episodes of constitutional rot and renewal. Because the

³³ E.g., Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J.F. 821, 821 (2021); Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. (forthcoming 2021) (manuscript at 17-25) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665032); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 152 (2019); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 772 (2006); Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1323-24 (2007); Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467, 471 (Roger C. Cramton & Paul D. Carrington eds., 2006).

³⁴ BALKIN, CYCLES, *supra* note 1, at 148-56; *see also* Jack M. Balkin, *Don't Pack the Court. Regularize Appointments.*, BALKINIZATION (Oct. 5, 2020, 11:00 AM), <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html> [<https://perma.cc/8QLU-SQFF>]. Disclosure: I am currently serving as a commissioner on the Presidential Commission on the Supreme Court of the United States.

³⁵ *See, e.g.*, ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 8 (2021) (describing current patterns of democratic retrenchment and how regimes corrode democracy by stealth); SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 190-91 (2015) (describing the role of constitutional courts in stabilizing self-rule in emerging democracies); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 571-81 (2018) (describing techniques of autocratic legalism that have produced democratic decline); Richard Albert, *A Theory of American Constitutional Time*, 101 B.U. L. REV. 1807, 1810-14 (contrasting the American model of constitutional repair with that in other countries).

³⁶ *See, e.g.*, Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 3-4 (2021) (explaining constitutional issues raised by the For the People Act of 2019); Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J.F. 171, 174 (2019) (same).

argument of the book stops at the very beginning of 2020, Part IV discusses where the story goes from there. A brief conclusion lists three possible paths of constitutional development.

I. A DISTURBANCE IN THE FORCE

Constitutional law professors, by training and inclination, are experts in constitutional doctrine. They are most at home writing about the work of courts and about what courts do or fail to do. They are skilled at writing about specific constitutional law decisions, about the coherence and development of bodies of constitutional doctrine, about the best way to interpret particular clauses of the Constitution, and, above all, about theories of judicial review and how they are or are not consistent with democracy. The standard models of American constitutional theory care a great deal about democracy. But in these theories, the major threat to democracy usually comes from unelected black-robed “judges on a rampage”³⁷ who, if they would only interpret the Constitution properly, would respect and protect our democratic system of government.

This basic approach to constitutional theory will continue in American law schools. But a series of new issues have sprung up in the past decade, exciting the interests of law professors, and pushing their work closer to that of political scientists.³⁸ These trends had emerged even before the 2020 election and the January 6 attack on the Capitol. The reasons are complicated.

A. *Political Polarization*

One reason why constitutional theory has changed is political polarization, especially among legal intellectuals. Both politics and the federal judiciary have become increasingly polarized.³⁹ Most contemporary constitutional theories—whether living constitutionalist or originalist—were first developed in the twentieth century.⁴⁰ Constitutional theorists created them in and for a relatively nonpolarized world.

³⁷ Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 78 (2007).

³⁸ E.g., Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 8 (2020); Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE 1, 2 (2018).

³⁹ See Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision-Making*, 56 HOW. L.J. 661, 694 (2013) [hereinafter Graber, *Constitutional Yo-Yo*] (“American politics for the past decades has been structured by increased elite polarization on almost all salient issues of the day. One consequence of this polarization is that the legal elites that Democrats appoint to the federal bench are highly likely to be more liberal on most constitutional issues than the average Democratic and the legal elites that Republicans appoint to the federal bench are highly likely to be more conservative on most constitutional issues than the average Republican.”).

⁴⁰ Jack Balkin, *Why Are Americans Originalist?*, in LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL 309, 313-314 (Richard Nobles &

Constitutional theories have often rested, either explicitly or implicitly, on an imagined consensus. The consensus might be in society itself.⁴¹ But since political disagreement is ubiquitous in the United States, the consensus more likely would be a consensus among legal and political elites that would form the starting place for further debate and disagreement.⁴² Even when people disagreed strongly on particular questions, constitutional theorists generally assumed that there was some generally acceptable method that courts (and especially the Supreme Court) could employ that, in turn, depended on a consensus of reasonable people—reasonable people much like constitutional law professors themselves!⁴³ Disagreements over specific issues, which were

David Schiff eds., 2014) (arguing that both originalism and living constitutionalism are products of the twentieth century); Jack M. Balkin, *Constitutional Interpretation and Change in the United States: The Official and the Unofficial*, JUS POLITICUM, <http://juspolicum.com/article/Constitutional-Interpretation-and-Change-in-the-United-States-The-Official-and-the-Unofficial-1088.html> [https://perma.cc/A2A7-E5EH] (last visited Sept. 23, 2021) (arguing that originalism and living constitutionalism responded to problems of constitutional modernity in the twentieth century).

⁴¹ E.g., CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 4 (2009) (arguing that when the Supreme Court announces a seemingly “new constitutional principle,” it is usually merely “endorsing, fairly late, a judgment that has long attracted widespread social support from many minds”); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757 (2011) (noting use of consensus in majoritarian constitutional theories); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 929 (1996) (“[T]he principles developed through the common law method are not likely to stay out of line for long with views that are widely and durably held in the society.”); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 245 (1973) (“The American people have a history and tradition which interact with their common problems to fashion attitudes, values, and aspirations that tend toward a dynamic, but nevertheless relatively cohesive, society, and that make it possible to discern a conventional morality.”).

⁴² E.g., CASS R. SUNSTEIN, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995) (arguing that judges should find low-level principles and specific results on which they can agree to promote stability and mutual respect); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14-15, 22-24 (1959) (arguing that constitutional reasoning should rest on neutral principles on which reasonable people can agree); Mark A. Graber, *Judicial Supremacy and the Structure of Partisan Conflict*, 50 IND. L. REV. 141, 166 (2016) [hereinafter Graber, *Judicial Supremacy*] (“Bickel, Wechsler, and fellow grand constitutional theorists assumed that the structure of partisan conflict during the long state of courts and parties was an enduring characteristic of American constitutionalism. Judicial supremacy flowed from a constitutional order structured by non-ideological parties and an elite consensus on constitutional principles.”).

⁴³ See Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 515 (2000) (“The purpose of post-Wechslerian constitutional theory is ‘to develop a generally accepted theory to guide the interpretation of the Constitution of the United States’ by the federal judiciary.” (quoting Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 1 (1998))); Graber, *Judicial Supremacy*, *supra* note 42, at 166 (arguing that modern constitutional theory was premised on elite consensus).

inevitable, would build on a common set of assumptions about how to look for and argue for answers.⁴⁴

The proper methods of interpretation, of course, were various, and people disagreed which ones were the proper ones. They included neutral principles, institutional settlement, process-protection, common law decision-making, and the many different flavors of originalism.⁴⁵ But in each case, reasonable persons, applying the method in good faith, could generate a bounded set of possible results.⁴⁶ In this respect conservative originalism has something in common with process protection and common law constitutionalism.

Constitutional theorizing has continued apace in recent years, even while the elite consensus on which most theories rested has long since dissolved.⁴⁷ In the early twenty-first century, legal intellectuals and legal and political elites have become even more polarized than members of the general public.⁴⁸ As a result, liberals and conservatives have created increasingly separate worlds of constitutional theory.⁴⁹ Each demands that the other accept its basic interpretive assumptions, which the other side is loath to do.⁵⁰ Thus conservative originalists complain: If only living constitutionalists would accept that the only way to

⁴⁴ See Whittington, *supra* note 43, at 516-17 (noting that modern constitutional theory focuses on how to achieve principled, reasoned decision-making in the judiciary).

⁴⁵ See generally Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57 (2004) (describing the multiple schools of constitutional interpretation).

⁴⁶ See Whittington, *supra* note 43, at 515 (explaining that this is the central goal of modern constitutional theory); Mark A. Graber, *The Collapse of the New Deal Conceptual Universe: The Schmooze Project*, 77 MD. L. REV. 108, 112-13 (2017) [hereinafter Graber, *Collapse*] (“[Academic lawyers] devoted their energies to developing grand theories of constitutional interpretation that provided members of the Supreme Court with the algorithms necessary for grounding their rulings in constitutional logics sufficient to overcome the countermajoritarian difficulty.”).

⁴⁷ See Graber, *Judicial Supremacy*, *supra* note 42, at 167 (arguing that “[g]rand constitutional theory” is now based on a false picture of constitutional politics); *id.* at 175 (“The federal judiciary cannot be said to reflect an elite consensus on fundamental constitutional values because no such elite consensus exists.”).

⁴⁸ See Graber, *Constitutional Yo-Yo*, *supra* note 39, at 665, 694-704 (2013) (summarizing studies on elite polarization).

⁴⁹ *Id.* at 709-12 (2013) (describing effects of elite polarization on constitutional law). An early harbinger of these changes was Laurence Tribe’s decision to stop writing his famous treatise on constitutional law in the early 2000s, midway through completing the third edition. Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 292 (2005) (“I’ve suspended work on a revision because, in area after area, we find ourselves at a fork in the road . . . and because conflict over basic constitutional premises is today at a fever pitch.”).

⁵⁰ Compare Antonin Scalia, *Essay, Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989) (arguing that nonoriginalists agree “on nothing except what is the wrong approach.”), and *id.* at 862-63 (“[T]he central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned.”), with Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) (“I think originalism (of the form that I challenge) is not merely false but pernicious as well.”).

produce objective decisions is to eschew results-oriented reasoning and discipline ourselves through a lawyerly focus on the Constitution's original public meaning! And liberal living constitutionalists complain: If only conservative originalists would recognize that their use of originalism is ahistorical and intellectually bankrupt and will simply disguise the political preferences of conservative jurists!

Unfortunately, we do not yet have theories of constitutional interpretation and judicial review that work well in a deeply polarized world.⁵¹ Even so, modern constitutional theory continues as before, assuming the problem away, although now half of the players wonder why the other half is so unreasonable.

B. *The Unraveling of the New Deal Settlement*

A second source of new questions for constitutional theory is the unraveling of long-standing basic assumptions about constitutional theories of interpretation and judicial review. These assumptions emerged during the constitutional crisis over the New Deal and have defined debate over judicial review and democracy ever since.⁵²

The New Deal settlement, which arose in a relatively depolarized politics, also presumed a certain kind of consensus.⁵³ Courts would defer to legislatures in ordinary social and economic legislation, leaving politicians to fight over the ordinary spoils of politics—property and economic questions.⁵⁴ Meanwhile the courts would focus on protecting democracy, fair procedures, and fundamental constitutional rights.⁵⁵ Following the Second World War, consensus approaches developed in history and political science.⁵⁶ The New Deal settlement fit nicely into this world. After all, the model would have made little sense if there was no basic agreement about what protected democracy, the major object of judicial

⁵¹ I would argue that we must synthesize the ideas of the contending camps. See JACK M. BALKIN, *LIVING ORIGINALISM* 3-4 (2011). But I do not pretend that this would do anything to relieve political polarization or narrow the range of disagreements.

⁵² See generally Graber, *Collapse*, *supra* note 46 (describing and critiquing the basic assumptions of constitutional theory since the New Deal); Graber, *Judicial Supremacy*, *supra* note 42, at 177 (“During the decades immediately before and after the New Deal, a political order marked by two non-ideological parties and a bipartisan elite consensus generated consistent, self-conscious and public missions for the Supreme Court, even as that mission was transformed at the midpoint of that regime.”).

⁵³ Graber, *Collapse*, *supra* note 46, at 112 (describing New Deal “consensus that elected officials represented democratic commitments, while judges represented constitutional commitments” and hence that “only judicial decisionmaking required constitutional justification”).

⁵⁴ Mark A. Graber, *Belling The Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 636-37 (2014) [hereinafter Graber, *Belling the Partisan Cats*] (describing distinct roles of judiciary and legislature in the New Deal era).

⁵⁵ See *id.* at 636-37 (2014); Graber, *Judicial Supremacy*, *supra* note 42, at 161.

⁵⁶ Driver, *supra* note 41, at 757.

solicitude in the post-1937 world. The New Deal settlement also would make little sense if democracy and the fairness of procedures could not be separated from fights over property, economics, and the spoils of politics.

As it happened, the model of politics implicit in the New Deal consensus *did* increasingly make little sense as time wore on. Ultimately the health of a republic and the fate of a democracy cannot be hived off from questions of economics and property. As the Framers recognized, huge inequalities of wealth are fatal to republics.⁵⁷ The deep connection between a (relatively) equitable political economy and the preservation of republican government led to not one but two political parties in American history that called themselves Republican. The first, Jefferson's Republicans, worried that increasing inequalities of wealth would betray the American Revolution and lead the country back to monarchism and aristocracy.⁵⁸ The second, the Republican Party founded in 1854, and named after Jefferson's Republicans, argued that the concentration of wealth in slaves and huge estates, which they called the "Slave Power," was crushing ordinary citizens under foot and destroying American democracy.⁵⁹

The connection between political economy and the survival of democracy emerged once again during the First Gilded Age and the rise of the Progressive

⁵⁷ See generally CLEMENT FATOVIC, *AMERICA'S FOUNDING AND THE STRUGGLE OVER ECONOMIC INEQUALITY* (2015) (describing the view widely held among the Founders that minimizing economic inequality was crucial to the preservation of freedom and republican government); Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 TEX. L. REV. 1301, 1320 (2016) (noting the founding generation's view that "relative economic equality was necessary for republican government"). See also *infra* text accompanying notes 93-96.

⁵⁸ See DOUGLASS G. ADAIR, *THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE, AND THE VIRTUOUS FARMER* 50-52 (Mark E. Yellin ed., 2000) (1964); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 151-52, 498 (2009); James Madison, *A Candid State of Parties*, NAT'L GAZETTE, Sept. 22, 1792, at 378 (arguing for a new party opposed to monarchism and hereditary privilege, which Madison associated with the Federalist Party).

⁵⁹ HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY*, at xii, 4, 6-7, 9, 13 (2014) ("A very few large planters, who controlled more than 90 percent of the South's wealth and owned more than half its slaves, swayed southern politics. Abolitionists had developed the idea that this 'Slave Power' was determined to dominate America by taking over the government . . ."); WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1856*, at 357-65 (1987); Matthew Karp, *The People's Revolution of 1856: Antislavery Populism, National Politics, and the Emergence of the Republican Party*, 9 J. CIV. WAR ERA 524, 526-27 (2019) (discussing the Republican Party's focus on the "Slave Power"); see also ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 46-50, 59-60, 63-65, 87-91 (1995) (describing Republican and Free Soil critiques of Southern society, which blamed the expansion of slavery for impoverishing Whites who did not own slaves, undermining social mobility, and perpetuating aristocracy).

movement.⁶⁰ The issue emerged yet again during the New Deal, but its resolution had fateful consequences.⁶¹

In effect, The New Deal settlement deconstitutionalized issues of constitutional political economy. More correctly understood, it withdrew these issues from the courts and relied instead on the democratic process to make constitutional claims of political economy and economic democracy.⁶² The New Deal's vision of a democratic political economy relied on a robust democratic constitutionalism.⁶³

The New Deal settlement assumed that the political process could and would protect itself from increasing inequalities of wealth and economic power. This assumption was like a time bomb waiting to go off. All that had to happen was a Second Gilded Age, in which, like the First, wealth inequality soared, economic power was converted into political power, and government become increasingly corrupt, dysfunctional, and effectively up for sale.⁶⁴

Increasing inequalities of wealth, which began sometime in the 1980s, created a vicious cycle.⁶⁵ They allowed wealthy individuals and companies to leverage their influence over the political process to produce tax and regulatory policies that allowed them to become even wealthier, which, in turn, allowed these groups even greater power to influence government policy to obtain an even larger share of the wealth created by the nation, and so on.⁶⁶ By the first decades of the twenty-first century, inequalities of wealth have reached Gilded Age

⁶⁰ See JOSEPH FISHKIN & WILLIAM FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (forthcoming 2022) (manuscript at 235-290) (detailing struggles over political economy and democracy in the Progressive Era).

⁶¹ *Id.* (manuscript at 310-13, 367-70, 395-433) (noting how the conservative reaction to the New Deal in the 1930s and 1940s blunted its promise of a social democratic political economy); *id.* (manuscript at 421) (explaining that as a result of decisions made in the 1930s and 1940s, "the language of progressive constitutional political economy recede[d] from mainstream public discourse and debate").

⁶² *Id.* (manuscript at 313) ("[W]hat New Dealers gained from the Court was not a decision to make the New Deal constitutional political economy its own. The main thing they asked of the Court was for the Court to step aside and let legislative and administrative actors carry on with the constitutional work they were better equipped—and disposed—to do.").

⁶³ *Id.* (manuscript at 311) ("A *democratic* government, on FDR's and the New Dealers' account, had not only the constitutional power, but the duty, to enact a host of new social and economic rights . . .").

⁶⁴ See *id.* (manuscript at 528-29) ("As America plunges deeper into a second Gilded Age, liberals' inherited assumptions and axioms about economics, politics, and constitutional law are beginning to dissolve. It is no longer tenable for liberals to presume, as they did in the late twentieth century, that the economy will largely police itself . . .").

⁶⁵ JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* 3 (2010).

⁶⁶ See *generally id.* (describing how fiscal and regulatory policies over several decades undermined public goods and services to shift income to wealthier Americans); cf. FISHKIN & FORBATH, *supra* note 60, at 275 ("Capitalist wealth has an inevitable tendency to convert economic into political domination.").

proportions, which is why it is appropriate to call ours a Second Gilded Age.⁶⁷ These features of political economy have been important contributors to America's mounting political polarization and accelerating constitutional rot.

Most of the theories of constitutional interpretation and judicial review that emerged in the twentieth century are not well equipped to focus on the connections between republicanism and political economy. First, the federal judiciary does not generally create new government programs, design the federal tax code, or control national fiscal or monetary policy. Therefore, it can only play a secondary role in affecting the distribution of wealth through its review of administrative regulations and statutes. Second, theories of constitutional interpretation tend to focus on individual rights and government structures rather than on the basic structure of the economy and its effects on democracy. Third, the New Deal settlement, which required judicial deference to economic legislation, placed most issues of political economy beyond the reach of judicial review. This made most theories of constitutional interpretation ill-equipped to deal with them. If your concern is the original meaning of "commerce" or "The Executive Power," you will not focus your attention on the political economy of republics. If you think that the central issue is how courts can protect the political process, you will miss the multiple ways that the process is undermined by features of political economy that are beyond the reach of courts. Starting in the 1970s, the most important connections between political economy and democracy began to involve the First Amendment—for example in campaign finance regulation and the use of the First Amendment as a deregulatory tool.⁶⁸ But in the New Deal settlement, the First Amendment was a preferred freedom, whose protection, virtually by definition, supported and did not conflict with democracy.⁶⁹

⁶⁷ E.g., Rupert Neate, *World's Witnessing a New Gilded Age as Billionaires' Wealth Swells to \$6tn*, *GUARDIAN* (Oct. 26, 2017, 11:48 AM), <https://www.theguardian.com/business/2017/oct/26/worlds-witnessing-a-new-gilded-age-as-billionaires-wealth-swells-to-6tn> [<https://perma.cc/4HZ7-9NSA>] ("The world's super-rich hold the greatest concentration of wealth since the US Gilded Age at the turn of the 20th century, when families like the Carnegies, Rockefellers and Vanderbilts controlled vast fortunes.").

⁶⁸ See, e.g., LAURA WEINRIB, *THE TAMING OF FREE SPEECH* 319 (2016) ("[I]n the 1970s, when economic stagnation tempered the social and cultural turmoil of the preceding decade, the First Amendment served other ends. Citing their rights of free speech, advertisers, political donors, and eventually employers chipped away at the reach of the regulatory state."); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 *HARV. L. REV. F.* 165, 167 (2015) (noting "that the First Amendment has become a powerful engine of constitutional deregulation"); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 *LAW & CONTEMP. PROBS.* 195, 195 (2014) (describing First Amendment Lochnerism).

⁶⁹ *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (noting "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment"); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

C. *Constitutional Dysfunction*

A third reason for a shift in theoretical agendas is America's increasingly dysfunctional political system. Following the rise of the Tea Party and the 2010 midterm elections, it became obvious that the federal government had become increasingly dysfunctional and that national politics was becoming increasingly—there is no better word for it—insane. The most obvious reasons were political polarization and the rise of the Internet and social media.⁷⁰ But my frequent coauthor Sanford Levinson pointed to deeper causes—the design of our political institutions and even of the Constitution itself.⁷¹ Levinson's key insight was that questions of constitutional design should move to the forefront of constitutional theory.⁷² The rise of comparative constitutionalism allowed scholars to gain some distance on the American model and also drew attention to issues of constitutional design. Scholars like Mark Tushnet, David Pozen, and Joseph Fishkin began to write about constitutional hardball and partisan warfare between Democrats and Republicans.⁷³

In 2013, Jim Fleming organized a symposium at the Boston University School of Law on constitutional theory and political dysfunction.⁷⁴ In a keynote address, I argued that the causes of our present dysfunction were tied to the exhaustion of the Reagan regime and upheavals in the Republican Party.⁷⁵ Sanford Levinson's and my 2019 book, *Democracy and Dysfunction*, was a debate between the two of us about the causes of political dysfunction in the United

⁷⁰ See, e.g., JOSHUA A. TUCKER, ANDREW GUESS, PABLO BARBERÁ, CRISTIAN VACCARI, ALEXANDRA SIEGEL, SERGEY SANOVICH, DENIS STUKAL & BRENDAN NYHAN, HEWLETT FOUND., *SOCIAL MEDIA, POLITICAL POLARIZATION, AND POLITICAL DISINFORMATION: A REVIEW OF THE SCIENTIFIC LITERATURE* 4 (2018), <https://www.hewlett.org/wp-content/uploads/2018/03/Social-Media-Political-Polarization-and-Political-Disinformation-Literature-Review.pdf> [<https://perma.cc/9AE9-2XDH>] (noting concerns that social media and disinformation are driving each other and undermining democracy).

⁷¹ See generally SANFORD LEVINSON, *FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012) [hereinafter LEVINSON, *FRAMED*] (arguing that constitutional dysfunction is the result of poor constitutional design); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 6 (2006) (noting the "many structural provisions of the Constitution that place almost insurmountable barriers in the way of any acceptable notion of democracy").

⁷² See LEVINSON, *FRAMED*, *supra* note 71, at 99.

⁷³ See Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018) (explaining why asymmetric constitutional hardball developed in the United States); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004) (defining and theorizing the practice of constitutional hardball).

⁷⁴ The papers were published in *Symposium: America's Political Dysfunction: Constitutional Connections, Causes, and Cures*, 94 B.U. L. REV. 575 (2014).

⁷⁵ Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1171-72 (2014).

States.⁷⁶ Levinson argued that the hard-wired provisions of the Constitution were a central cause, and that nothing short of a new constitutional convention or a new set of constitutional amendments would be adequate to cure America's political dysfunction.⁷⁷ I argued that the problems stemmed from features of American political culture and sub-constitutional features of our political and party system, and that we could ameliorate most of our problems through political mobilization and sub-constitutional reforms.⁷⁸ I also argued, as before, that the Reagan regime was on its last legs and that the next regime offered possibilities for political renewal.⁷⁹ *Democracy and Dysfunction* spent almost no time on the standard questions of constitutional theory—constitutional interpretation and judicial review. It focused instead on American political development, the party system, constitutional structure, and constitutional design.⁸⁰

D. *Democratic Backsliding*

A fourth reason for change in constitutional theory is the Trump presidency. Trump's rise to power shifted the attention of constitutional theorists and political scientists toward the health and resilience of democratic institutions. Other than students of comparative political systems, most American constitutional scholars were late to the party. In the early twenty-first century, democracies around the world had begun decaying.⁸¹ Trump's election caused many people to fear that now it was America's turn.

Donald Trump not only won the 2016 election; he engaged in a hostile takeover of one of the country's two major political parties and then proceeded to completely dominate political discourse in the United States for a period of over five years. Trump's demagogic politics, blatant corruption, shameless lying, inveterate gaslighting, and remarkable skills at media manipulation generated increasing attention to how democracies decay and backslide into forms of soft authoritarianism.⁸² For many political and constitutional thinkers, it was difficult to focus on anything other than Trump and Trump-adjacent subjects like propaganda, fake news, the "deep state," populism, government corruption, and abuses of executive power.

⁷⁶ See generally LEVINSON & BALKIN, *supra* note 27 (debating the causes of constitutional dysfunction and proposing constitutional reforms though an "epistolary exchange").

⁷⁷ *Id.* at 12-14.

⁷⁸ *Id.* at 21-23.

⁷⁹ *Id.* at 55-57, 78-80, 198-99, 203.

⁸⁰ See *id.* at 175-81, 199-203 (discussing constitutional reforms).

⁸¹ *Freedom in the World 2019, Democracy in Retreat*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2019/democracy-retreat> [<https://perma.cc/MF7Q-TE3E>] (last visited Sept. 23, 2021) (describing democratic declines in the early twenty-first century).

⁸² See, e.g., TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 2-3, 26 (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 5 (2019).

Spurred by Trump's election, the Brexit referendum, and earlier developments in Hungary, Poland, the Philippines, Turkey, and Brazil, a cottage industry soon developed in studies of populism, democratic retrogression and authoritarianism.⁸³ The "f-word"—Fascism—came back into fashion as scholars began to draw comparisons between fascist and authoritarian regimes of the past and the decay of contemporary democracies.⁸⁴

Together these four factors have generated a new set of questions for American constitutional theory: how to diagnose our constitutional system's problems, and how to repair, reform, and maintain our democracy. These questions focus on the decay and defense of constitutional and political systems, and on the health and survival of democracy itself.

II. CONSTITUTIONAL THEORY AS THE STUDY OF REGIMES AND GENERATIONS

The Cycles of Constitutional Time is a contribution to this change in constitutional theory. Its central concern is the health, development, and survival of the constitutional system as a whole. It does not say much about the proper way to interpret the Constitution, and it does not offer a theory of judicial review. Instead, it views judicial review and theories of constitutional interpretation through the lens of political development and the rise and fall of constitutional regimes. It argues that how people think about constitutional interpretation and judicial review depends a great deal on where they sit in constitutional time and the generation to which they belong.⁸⁵

Although I continue to remain very interested in normative questions of constitutional interpretation—the subject of *Living Originalism*—*Cycles* has a different focus. It treats theories of constitutional interpretation and judicial review as features of constitutional development that respond to changes in the structures of party competition.⁸⁶ The book offers normative distance from the debates of the present by locating these debates in the cycles of constitutional time.

To understand the health and future of constitutional government in the United States, we must focus on how the constitutional system works as a whole. To understand how the system works as a whole, we must focus on the design of constitutional institutions, how those institutions can be undermined over time, and how best to repair and maintain them.

⁸³ E.g., Mark A. Graber, Sanford Levinson & Mark Tushnet, *Constitutional Democracy in Crisis?*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 1, 7-8 (Mark A. Graber, Sanford Levinson & Mark Tushnet, eds. 2018); GINSBURG & HUQ, *supra* note 82, at 26-27; LEVITSKY & ZIBLATT, *supra* note 82, at 176-77; Kim Lane Scheppele, *supra* note 35, at 549-56.

⁸⁴ E.g., RUTH BEN-GHIAT, STRONGMEN: MUSSOLINI TO THE PRESENT 5 (2020); JASON STANLEY, HOW FASCISM WORKS: THE POLITICS OF US AND THEM 5-6 (2018); TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 11-13 (2017).

⁸⁵ BALKIN, CYCLES, *supra* note 1, at 69-71, 83-84.

⁸⁶ *Id.* at 83.

Some of these features of constitutional systems—federalism, the separation of powers, the electoral system, and judicial review—are very familiar to constitutional scholars and have generated enormous literatures. Other features are equally familiar, but law professors pay relatively little attention to them. Sanford Levinson calls these the “Constitution of Settlement”: the features of the Constitution that profoundly structure political competition but that produce relatively little constitutional litigation and few judicial opinions.⁸⁷ These features include the Constitution’s choice of a presidential rather than a parliamentary system; the Constitution’s staggered system for electing Presidents, senators, and representatives; life tenure for federal judges; and first-past-the-post elections. Some of these features are “hard-wired” into the Constitution; others, like our choice of first-past-the-post elections and single-member districts in the House of Representatives, are long-standing but could be altered through legislation.

To these we should add three other important elements of the constitutional system. The first is the party system. The second is the organization of politics into regimes. The third is generational change.⁸⁸ The text of the Constitution does not mention any of these features directly. The Twelfth Amendment implicitly recognizes the existence of parties,⁸⁹ and the Preamble points to the existence of “Posterity,” that is the succession of generations.⁹⁰ But working together within the text and structure of the Constitution, these three features—regimes, parties, and generations—drive constitutional development forward over time. The party system generates a path of constitutional development organized around regimes, in which a dominant party shapes the basic agendas of politics. The central problem for each dominant party is how to keep the regime going as one generation succeeds the next and new problems of politics test the regime’s coalition, commitments, and resiliency.

Cycles asks why American democracy has become dysfunctional, and whether there is hope for constitutional renewal. Its analysis is not purely descriptive. It is interpretive.⁹¹ Regimes are interpretive constructs; they reflect both how the participants understand the politics of their time and how historians understand politics in hindsight.

⁸⁷ 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, 1136 (2014).

⁸⁸ Cf. Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1519 (1997) (arguing that “the basic unit of Constitution” is not “The Theory” or “The Clause” but “The Generation”).

⁸⁹ See U.S. CONST. amend. XII (requiring “distinct ballots” for President and Vice-President, thus implicitly acknowledging that parties would run candidates on the same ticket).

⁹⁰ U.S. CONST. pmbl.

⁹¹ See Albert, *supra* note 35, at 1815 (pointing out that cycles combine normative and descriptive elements).

Although I draw on political scientists' measurements of party polarization, the idea of a cycle of polarization and depolarization is also an interpretation of history. Polarization in the late nineteenth century was different in certain respects from the kinds of polarization we experience today.⁹² Treating them as a single phenomenon is an interpretive choice that stems from my argument about what keeps republics going and what causes them to rot and decay.

Finally, the concept of constitutional rot, which rests on a long tradition of theories about republics and how to keep them going, is clearly normative as well as interpretive. A libertarian opposed in principle to the redistribution of wealth might argue that the real "rot" in a democratic system is the growth of government and the expansion of progressive income taxation and redistributive social welfare programs. My interpretation of history is to the contrary. Republican government is a commitment to majority rule and representative government. But it is far more than a system of representation. Republics are delicate things that require a commitment to the public good rather than merely the facilitation of private interests.⁹³ This was the founding generation's view, and it is still true today.⁹⁴ Republican government also requires a certain kind of political economy.⁹⁵ That means that there are a bounded set of political economies in which republics can thrive. Republics do not require a strict equality of property, but they cannot survive too much wealth inequality. This was also the founding generation's view, and it is also still true today.⁹⁶

III. CYCLES AS THE INTERSECTION OF POLITICAL STRUCTURE AND POLITICAL AGENCY

The constitutional regime is the historical instantiation of the Constitution-in-practice. The succession of generations is the great moving force of constitutional change. And the continuous interaction—and mutual constitution—of political agency and political structure drives the evolution of the constitutional/political system.

To understand how the constitutional system, considered as a whole, evolves over time, we need tools that will help us think about the interaction of

⁹² See Frances E. Lee, *Patronage, Logrolls, and "Polarization": Congressional Parties of the Gilded Age, 1876-1896*, 30 *STUD. AM. POL. DEV.* 116 *passim* (2016) (arguing that in the late nineteenth century parties fought over patronage and benefits rather than simply over ideology).

⁹³ BALKIN, *CYCLES*, *supra* note 1, at 50-53; Jack M. Balkin, *Which Republican Constitution?*, 32 *CONST. COMM.* 31, 45-47 (2017).

⁹⁴ BALKIN, *CYCLES*, *supra* note 1, at 52.

⁹⁵ *Id.* at 50-53; Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 *TEX. L. REV.* 1427, 1437-38 (2016).

⁹⁶ GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 11-12, 232-39 (2017); Sitaraman, *supra* note 57, at 1320 ("[T]he founding generation embraced the middle-class-constitutional theory that relative economic equality was necessary for republican government . . ."); see also FISHKIN & FORBATH, *supra* note 60 (tracing the history of this idea from the founding to the present).

constitutional structure and political agency. In this book, I explain this interaction of structure and agency through a very old idea in political theory—indeed, one of the oldest—the concept of cycles.⁹⁷

I do not mean to suggest that there are covering laws of history. Politics is not astronomy, and political change is full of contingencies. Rather, I am interested in the dialectic between the constitutional and political structures that Americans have collectively produced and how Americans working within those structures struggle with each other, altering the playing field of politics as a result. This interaction between structure and agency produces recurrent patterns in American constitutional and political history, which take the form of recurrent oscillations or cycles.⁹⁸

A. *The Cycle of Regimes*

The first of these patterns is the rise and fall of political regimes. Here, I build on the work of my Yale colleague Stephen Skowronek, who has written about cycles of presidential leadership, and the corresponding cycles of political regimes.⁹⁹

Because of our constitutional system and its system of representation, it is difficult for a party to control all of the levers of power in America. But once a party does achieve this, it tends to dominate politics for a long time, and it tends to shape the agendas of politics for a long time. To explain why the constitutional system works this way, we need to consider how constitutional structure affects political agency.¹⁰⁰ Three features are worthy of note.

First, the United States has a first-past-the-post system for most elections. This system encourages the development of a party system organized around broad coalitions, usually involving two major political parties.¹⁰¹

⁹⁷ 4 POLYBIUS, THE HISTORIES 372-79 (Robin Waterfield trans., Oxford Univ. Press 2010) (theory of cycles among regimes); 8 PLATO, THE REPUBLIC 234-333 (T.E. Page et al. eds., Paul Shorey trans., Harvard Univ. Press 1935) (arguing that regimes cycle from aristocracy to tyranny); 5 ARISTOTLE, POLITICS 209-57 (Benjamin Jowett trans., Random House 1943) (arguing that political regimes cycle from monarchy to anarchy).

⁹⁸ BALKIN, CYCLES, *supra* note 1, at 5 (“[Cycles of American politics] arise through the interaction of political will with institutional structures. People cause these cycles through mobilization, organization, and the exercise of political will in a particular institutional environment. The institutions shape the actions, while the effects of the actions slowly remake the institutions.”).

⁹⁹ See, e.g., STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 15 (rev. ed. 1997).

¹⁰⁰ The next ten paragraphs are adapted from Jack M. Balkin, *Rot and Renewal: The 2020 Election in the Cycles of Constitutional Time*, 13 NE. U. L. REV. 617, 622-23 (2021) [hereinafter Balkin, *Rot and Renewal*].

¹⁰¹ See, e.g., *First Past the Post*, ELECTORAL REFORM SOC’Y, <https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/first-past-the-post/> [https://perma.cc/3WPN-J2PA] (last visited Sept. 23, 2021) (explaining that first-past-the-post systems, in which candidates with the most votes win even if they do not gain a majority, tend to produce two large parties, making it difficult for third parties to win elections).

Second, the United States has a presidential rather than a parliamentary system. Different parties can control the presidency and the two Houses of Congress, and this has happened many times in American history.¹⁰²

Third, the United States has a staggered system of national elections and offices. The President serves for four years.¹⁰³ Senators serve for six years (with only a third of the Senate up for election at a time).¹⁰⁴ The entire House is up for election every two years.¹⁰⁵ Federal judges have life tenure.¹⁰⁶

Together, these features of the constitutional system make it very difficult for a single political party to gain control of all of the levers of power in the federal government and to hold on to that control for a significant period of time.¹⁰⁷ Put another way, these structural features of the American constitutional system tend to slow the pace of political transformations and make significant change difficult.

This institutional structure has important consequences, which can be good or bad, depending on your perspective. It frustrates revolutionary movements for change.¹⁰⁸ Pressures for change tend to build up over long periods of time until they finally break through.¹⁰⁹ These structural features of our constitutional system make revolutionary changes in government relatively infrequent, but when they do occur, they can be very significant.¹¹⁰

Some of these features of the system are the result of deliberate design. Some are the product of tradition. Still others are the product of contingency. But however you slice it, this collection of structural features gives American politics a distinctive shape. American constitutional and political history is structured in terms of political regimes—long periods of time in which one of the major parties tends to dominate national politics.¹¹¹ The dominant party does not win every election, but it wins most of them, and it sets the agenda for what people

¹⁰² See, e.g., Katherine Schaeffer, *Single-Party Control in Washington Is Common at the Beginning of a New Presidency, but Tends Not to Last Long*, PEW RSCH. CTR. (Feb. 3, 2021), <https://www.pewresearch.org/fact-tank/2021/02/03/single-party-control-in-washington-is-common-at-the-beginning-of-a-new-presidency-but-tends-not-to-last-long/> [https://perma.cc/2E4Q-4XQT].

¹⁰³ U.S. CONST. art. II, § 1, cl. 1.

¹⁰⁴ *Id.* art. I, § 3, cl. 1.

¹⁰⁵ *Id.* art. I, § 2, cl. 1.

¹⁰⁶ *Id.* art. III, § 1.

¹⁰⁷ See BALKIN, *CYCLES*, *supra* note 1, at 48 (noting how this system also helps the country survive constitutional rot).

¹⁰⁸ Balkin, *Rot and Renewal*, *supra* note 100, at 622.

¹⁰⁹ *Id.*

¹¹⁰ *Cf.* 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 31-32 (1991) (arguing that American constitutional development has featured relatively brief moments of transformative politics punctuating long periods of normal politics).

¹¹¹ See BALKIN, *CYCLES*, *supra* note 1, at 14-15 (describing rise and fall of regimes over long periods of time); Table 1 *infra* note 120 (showing length of regimes).

think is politically possible and impossible in a particular period.¹¹² In Andrew Polsky's words, a new regime "challenges core tenets of the [previous] established political order, secures effective national governing power, defines broadly the terms of political debate, and maintains sufficient power to thwart opposition efforts to undo its principal policy, institutional, and ideological achievements."¹¹³

Regimes develop in American politics through the interaction of structure and agency—because the constitutional and political system in the United States makes political dominance hard to achieve and, once achieved, hard to displace. Once a party becomes dominant, it tends to stay dominant for a long period of time because, even if politics subsequently becomes more competitive, it takes a lot of time and many elections for the other party to become dominant in its place.¹¹⁴ That does not mean that the dominant party faces no obstacles. Quite the contrary, political dominance begins to be challenged almost as soon as it is established, and the dominant party's position and its winning coalition slowly decay over time.¹¹⁵ The country faces new challenges that threaten the party's commitments, internal tensions develop within the coalition, and the opposition party tries to find ever new ways to exploit wedge issues that split the coalition, generate defections, and gain the support of younger voters.¹¹⁶

Now suppose we changed features of the constitutional system. Suppose, for example, that instead of a presidential system we had a parliamentary system, in which the head of the winning legislative party becomes Prime Minister, and the winning party (or its coalition) immediately gains control of the executive and legislative branches after each election. This model creates a different interaction between structure and agency. There is no separation of powers and fewer checks and balances in the American sense. As a result, the new majority party has many fewer limits on what it can do—as long as it can hold its coalition partners together—and the opposition parties are effectively shut out of governance until the next election.¹¹⁷ That means that there are many small revolutions instead of a few big ones.¹¹⁸ Each time a party gained control of the government, it would begin to change things. There might still be political inertia and institutional limits to change, and parties would have to adapt to generational expectations, but the result would be different than the U.S. system.

Or imagine that instead of first-past-the-post elections, we had a system of proportional representation and a multiparty system. This might make politics

¹¹² BALKIN, CYCLES, *supra* note 1, at 13.

¹¹³ Andrew J. Polsky, *Partisan Regimes in American Politics*, 44 POLITY 51, 57 (2012).

¹¹⁴ Balkin, *Rot and Renewal*, *supra* note 100, at 622.

¹¹⁵ *Id.* at 624 ("[I]t is fair to say that almost as soon as a new dominant party establishes itself, its grip on political power slowly begins to decay as it navigates new problems and circumstances.").

¹¹⁶ See BALKIN, CYCLES, *supra* note 1, at 14 (describing regime decay).

¹¹⁷ Balkin, *Rot and Renewal*, *supra* note 100, at 623.

¹¹⁸ *Id.*

even more difficult and unstable—think of Israel and Italy as two examples.¹¹⁹ But American politics would probably not cycle through regimes in the same way.

In American history there are six constitutional political regimes, each with a dominant political party, from the founding up to the present.

Table 1. Regimes in American Political History, 1789-2020.¹²⁰
(Years of White House control in parentheses)

Name	Years	Dominant Party	Opposition Parties
Federalist	1789–1801	Federalists (12)	Jeffersonians (0)
Jeffersonian	1801–1829	Democratic-Republicans (28)	Federalists (0)
Jacksonian	1829–1861	Democrats (24)	National Republicans; Whigs; Republicans (8)
Republican	1861–1933	Republicans (52)	Democrats (20) ¹²¹
New Deal/ Civil Rights	1933–1981	Democrats (32)	Republicans (16)
Reagan (Second Republican)	1981–?	Republicans (24)	Democrats (16)

A central question in *Cycles* is whether the sixth, Reagan regime, led by the Republican Party and the conservative movement, is now exhausted, and whether we are on the verge of a seventh regime, in which the Democrats are most likely the new dominant party, with a different set of issues organized

¹¹⁹ See Yohanan Plesner, Opinion, *Israel's Political System Is Broken. Here Is How to Fix It*, ISR. DEMOCRACY INST. (Mar. 15, 2021), <https://en.idi.org.il/articles/34025> [<https://perma.cc/S3BU-HSG3>] (“A key underlying factor in this political instability is the multiparty coalitions needed to form governments.”); Alex Bain, *Israel's Flawed Electoral System: Obstacle to Peace and Democracy*, MIDDLE EAST INST. (Feb. 1, 2011), <https://www.mei.edu/publications/israels-flawed-electoral-system-obstacle-peace-and-democracy> [<https://perma.cc/4PW7-6XGY>] (“Israeli politics is notable for its wide array of parties and unstable coalition governments. The main institutional cause of this chronic instability is the system of nationwide proportional representation, which gives disproportionate influence to minor parties.”); Adam Taylor, *Why Italian Governments so Often End in Collapse*, WASH. POST (Aug. 20, 2018), <https://www.washingtonpost.com/world/2019/08/20/why-italian-governments-so-often-end-collapse/> (“In the past three decades, [Italy] has had 13 separate prime ministers.”).

¹²⁰ BALKIN, *CYCLES*, *supra* note 1, at 15 tbl.2.1. In Table 1, I begin each regime in the year a new President takes office, while in the book, I begin with the date of the preceding election that shifts power.

¹²¹ I count Andrew Johnson as a Democratic president, even though he ran as Abraham Lincoln's running mate in 1864 as part of a national unity ticket. ANNETTE GORDON-REED, ANDREW JOHNSON 76 (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2011).

around their multiracial coalition of urban and suburban voters, college graduates, women, and racial minorities.¹²²

However, as I describe in the book, there is another possibility, similar to what happened in 1896.¹²³ Since the Civil War, the Republican Party had been the dominant party in American politics, but by the 1890s, it seemed as if the Democrats, led by William Jennings Bryan, and fueled by a populist insurgency, might form a new regime.¹²⁴ But the Republican Party got a second wind. It reorganized its coalition around a new set of issues, won a decisive victory in 1896, and remained on top for decades to come.¹²⁵ That is why the Republican regime that runs from Lincoln to Hoover is by far the longest in American history.

In 1896, the key figure in the Republican resurgence was William McKinley, who modernized the Republican coalition, attracted new voters, and helped move American politics toward a new set of issues.¹²⁶ Today the key figure would be Donald Trump, who has turned the Republican Party into a Trumpist party, and—very much unlike William McKinley—into a cult of personality.¹²⁷

Can Trump do for today's Republican Party what McKinley managed to do in 1896? If so, Joe Biden's presidency will be little more than a blip on the screen, a minor detour from a second long Republican era of dominance. Instead of a new regime led by the emerging Democratic coalition, American politics will be structured by Trumpism, for better and for worse.

B. *Polarization and Depolarization*

A second pattern in American politics extends well beyond the cycle of political regimes. This is a long undulation between political polarization and depolarization.¹²⁸ Our modern American political party system, with its two major political parties, is really a product of the Civil War.¹²⁹ After the Civil

¹²² See BALKIN, CYCLES, *supra* note 1, at 17-18 (describing potential successor to Reagan coalition).

¹²³ *Id.* at 27.

¹²⁴ *Id.* at 16.

¹²⁵ *Id.* at 16, 27.

¹²⁶ *Id.* at 27; see R. HAL WILLIAMS, REALIGNING AMERICA: MCKINLEY, BRYAN, AND THE REMARKABLE ELECTION OF 1896, at 153 (2010) (describing the new political coalitions, sets of issues, and methods of campaigning in the 1896 election).

¹²⁷ See BALKIN, CYCLES, *supra* note 1, at 27 (describing Trump's transformation of the party); Tim Alberta, *The Grand Old Meltdown*, POLITICO (Aug. 24, 2020, 4:30 AM), <https://www.politico.com/news/magazine/2020/08/24/republicanmeltdown-trump-convention-400039> [<https://perma.cc/Y2AV-DQMZ>] ("It can now safely be said, as his first term in the White House draws toward closure, that Donald Trump's party is the very definition of a cult of personality. It stands for no special ideal. It possesses no organizing principle. It represents no detailed vision for governing.").

¹²⁸ BALKIN, CYCLES, *supra* note 1, at 30-31.

¹²⁹ *Id.* at 33.

War there was a long period of polarized politics throughout the Gilded Age.¹³⁰ Then, as the Gilded Age gave way to the Progressive Era, something happened. Politics began to depolarize.¹³¹ Polarization bottomed out during the New Deal, and politics stayed mostly depolarized until the Voting Rights Act in 1965.¹³² The 1960s led to a racial realignment between the two major parties and shortly thereafter, the beginning of the culture wars.¹³³ Polarization began to increase slowly in the 1970s and 1980s.¹³⁴ It really took off in the mid-1990s, became even worse in the 2000s, and is almost unbearable today.¹³⁵

This cycle of polarization and depolarization is also caused by the interaction of political agency with features of the American political system. If we got rid of our first-past-the-post system and moved to a system of ranked-choice voting, it might dampen tendencies toward polarization.¹³⁶ That is because ranked-choice voting allows the formation of multiple parties representing multiple ideologies.¹³⁷ Politicians will want to win second- and third-place votes as well as first-place votes, and so they will attempt to reach out to different kinds of voters.¹³⁸ Many people believe that the modern primary system has also

¹³⁰ Lee Drutman, *American Politics Has Reached Peak Polarization*, VOX (Mar. 24, 2016, 4:20 PM), <https://www.vox.com/polyarchy/2016/3/24/11298808/american-politics-peakpolarization> [<https://perma.cc/RDL4-XM9B>]; Jeff Lewis, *Polarization in Congress*, VOTEVIEW (June 4, 2020), https://www.voteview.com/articles/party_polarization [<https://perma.cc/DPH9-WQKL>] (featuring graphic of “[l]iberal-conservative partisan polarization by chamber”).

¹³¹ See BALKIN, CYCLES, *supra* note 1, at 36.

¹³² See Lewis, *supra* note 130.

¹³³ See, e.g., JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 613-16 (2018) (describing George Wallace’s 1964 racially divisive presidential campaign and the rise of far-right, polarizing figures such as Barry Goldwater and Phyllis Schlafly).

¹³⁴ See Lewis, *supra* note 130.

¹³⁵ *Id.*; see also Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in AM. POL. SCI. ASS’N, NEGOTIATING AGREEMENT IN POLITICS 19, 20-21 (Jane Mansbridge & Cathie Jo Martin eds., 2013) (“From the 1930s until the mid-1970s . . . [n]ot only were [roll-call voting] differences between the typical Democratic and Republican legislators small, but there also were significant numbers of conservative Democrats and liberal Republicans.”); *id.* at 21-22 (noting that, “[s]ince the 1970s . . . there has been a steady and steep increase in the polarization of both the House and Senate” and that “[m]any issues that were once distinct from the party-conflict dimension have been absorbed into it”).

¹³⁶ BALKIN, CYCLES, *supra* note 1, at 33.

¹³⁷ See LEE DRUTMAN, BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA 209 (2020) (arguing for ranked-choice voting and other reforms to encourage the formation of multiple parties); LEVINSON & BALKIN, *supra* note 27, at 199-203 (arguing for ranked-choice voting, reform of the Electoral College, and repealing the federal statute that requires single-member House districts).

¹³⁸ DRUTMAN, *supra* note 137, at 213 (arguing that negative campaigning is riskier and more complicated “when ranked-choice voting is involved, since parties and candidates are also competing to be voters’ second and third choices”).

contributed to political polarization.¹³⁹ If the United States had ranked-choice voting and different methods of candidate selection, we might not have seen long periods of increasing polarization in American history followed by a trough of depolarization in the middle of the twentieth century.

Still another reason for the long cycle of polarization arises from the two-party system created by first-past-the-post rules and how parties try to undermine or break apart each other's coalitions to win elections. With a two-party system and first-past-the-post rules, major political parties tend to be broad coalitions of voters who are united on some sets of issues even if they are strongly divided on other sets of issues.¹⁴⁰ The coalition can stay together as long as the first, unifying, set of issues form the central dividing line between the two major political parties. But if one party figures out how to expand its coalition by highlighting the issues that divide its opponents' coalition (and does so without fracturing its own), it can break apart the other party's coalition and attract more of its voters.¹⁴¹

For example, the Democratic Party in the New Deal/Civil Rights regime was mostly united on issues of economics and redistributive social welfare programs.¹⁴² But the party was a coalition of Northern and Southern Democrats

¹³⁹ See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 298 (2011) ("The single institutional change most likely to lead to *some* moderation of candidates and officeholders, across all elections, would be to change the design of primary elections."). For a contrary view, see Nolan M. McCarty, *The Limits of Electoral and Legislative Reform in Addressing Polarization*, 99 CALIF. L. REV. 359, 363-66 (2011), which summarizes the political science literature and concludes that "the way in which states structure their nominating primaries seems to have very little impact on the degree of polarization or candidate extremism."

¹⁴⁰ See E. E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE* 66-67 (1964) (arguing that political success consists in choosing which conflicts to fight over, since groups contain many different interests); Jennifer Victor, *The Clockwork Rise of Donald Trump and Reorganization of American Parties*, VOX (Mar. 14, 2016, 4:50 PM), <https://www.vox.com/mischiefs-of-faction/2016/3/14/11223982/clockwork-rise-of-donald-trump> ("Our electoral rules more or less guarantee that the US will nearly always have only two dominant parties, because we elect only one person to each legislative district. This means that our parties will always be loose coalitions, 'big tents,' or broad umbrellas that typically include strange bedfellows.").

¹⁴¹ See SCHATTSCHEIDER, *supra* note 140, at 67 ("Political conflicts are waged by coalitions of inferior interests held together by a dominant interest. The effort in all political struggle is to exploit cracks in the opposition while attempting to consolidate one's own side."); Gary Miller & Norman Schofield, *Activists and Partisan Realignment in the United States*, 97 AM. POL. SCI. REV. 245, 249 (2003) [hereinafter Miller & Schofield, *Activists*] ("[T]here will always be an electoral incentive for the losing party to split the majority party by means of the suppressed policy dimension and then woo away some pivotal voters from the winning party.").

¹⁴² See SIDNEY VERBA & GARY R. ORREN, *EQUALITY IN AMERICA: THE VIEW FROM THE TOP* 128 (1985) ("Since the New Deal, Democrats have vigorously promoted social welfare programs . . . a higher minimum wage, jobs programs, and extended social security and welfare benefits.").

who were deeply divided on issues of race, religion, and culture.¹⁴³ As long as the central issues of American politics were economics, redistribution, and government programs, Democrats could hold together, and Republicans—the traditional party of big business—would usually find itself in the minority.¹⁴⁴ Once demands for racial and sexual equality and the culture wars became central to American politics, the New Deal coalition of liberal and conservative Democrats began to unravel.¹⁴⁵ Republicans figured out how to develop wedge issues of identity, race, religion, and culture, capitalizing on the culture wars that began in the 1960s and 1970s.¹⁴⁶ Republicans also found ways to make issues of economic redistribution racially coded so that they, too, became part of the culture wars.¹⁴⁷ In this way, they broke apart the New Deal coalition and created the Reagan coalition.¹⁴⁸

Political activists have incentives to push issues that can successfully break apart the other party's coalition and redraw political battle lines to their

¹⁴³ See BYRON E. SHAFER, *THE AMERICAN POLITICAL PATTERN: STABILITY AND CHANGE*, 1932-2016, at 135 (2016) (describing New Deal coalition); Gary Miller & Norman Schofield, *The Transformation of the Republican and Democratic Party Coalitions in the U.S.*, 6 PERSPS. ON POL. 433, 438 (2008) [hereinafter Miller & Schofield, *Transformation*] (describing tensions within Northern and Southern wings of the New Deal coalition).

¹⁴⁴ See Lee Drutman, *How Race and Identity Became the Central Dividing Line in American Politics*, VOX (Aug. 30, 2016, 10:40 AM), <https://www.vox.com/polyarchy/2016/8/30/12697920/race-dividing-american-politics> (“The Great Depression had made economics the fundamental dividing line of conflict. And with Republican President Herbert Hoover getting the blame for the collapse, Democrats were on the winning side of the issue.”).

¹⁴⁵ See *id.* (“[T]he Democratic majority from 1932 to 1964 contained within it the seeds of its own destruction — in particular, an internal conflict between Northern liberals and Southern conservatives over the issue of civil rights.”); SHAFER, *supra* note 143, at 135 (discussing how division between Northern and Southern Democrats “was present for all to see in the battle over the Voting Rights Act of 1965”).

¹⁴⁶ See E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* 12 (1991) (arguing that cultural issues allowed Republicans to split the New Deal coalition); Aram Goudsouzian, *Why the Republican Party Is So Polarizing*, WASH. POST (Nov. 6, 2018), <https://www.washingtonpost.com/outlook/2018/11/06/why-republican-party-is-so-polarizing/> (arguing that the Republican Party's strategy of polarization began with George Wallace's 1968 campaign and the emergence of the New Right); Drutman, *supra* note 144 (“[The backlash against civil rights reforms] gave Republicans the cross-cutting issue with a clear majority they needed: race and identity. With Nixon's strategic guidance, Republicans went full steam ahead in making it the central dividing line in American politics.”).

¹⁴⁷ STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* 7-36 (2020) (describing Republican strategists' and politicians' use of race); IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 4, 58-59 (2015) (describing Republicans' racialized framings of social welfare programs).

¹⁴⁸ See BALKIN, *CYCLES*, *supra* note 1, at 30-31.

advantage.¹⁴⁹ For simplicity's sake, imagine two basic dimensions of policy controversy. One is identity: culture, race, religion, and morality. The second is economics: the distribution of income in the country and the use of tax dollars to create social welfare programs (like Social Security and Medicare) and public goods. Parties have a choice about which set of issues they want to emphasize in forming their coalitions.

Roughly speaking, when the two political parties primarily face off over issues of identity—culture, race, religion and morality—polarization will tend to increase.¹⁵⁰ That is because these are fights over status. They are fights over who is more (or who is equally) important, morally worthy, and American. Status conflict tends to be zero-sum—if I have more status, you have less.¹⁵¹ This often makes status-based politics bitter and polarizing. But when the two parties primarily face off over issues of economics—the distribution of income in the country and investment in public goods—politics has a chance to become less polarized. That is not entirely surprising. People can often find ways to compromise over infrastructure investments, fiscal policy, and government programs. They can also agree on policies that grow the economy or increase opportunities. Of course, whether people see an issue as a question of identity or a question of economics depends greatly on how issues are framed. If politicians can successfully connect redistribution to race, as Republicans did in the late twentieth and early twenty-first centuries, economic issues can also become status issues.¹⁵²

The period of relative depolarization in the twentieth century is partly due to the fact that both major political parties had essentially withdrawn from protecting the rights of Black Americans for a very long time.¹⁵³ The Republican Party, the Party of Lincoln, stopped pushing for Black civil rights by the 1890s.¹⁵⁴ By the early twentieth century the Democrats, who had been the party

¹⁴⁹ See, e.g., Miller & Schofield, *Activists*, *supra* note 141, at 249 (“[T]here will always be an electoral incentive for the losing party to split the majority party by means of the suppressed policy dimension and then woo away some pivotal voters from the winning party.”).

¹⁵⁰ See, e.g., Gary Lawson, *What is “United” About the United States?*, 101 B.U. L. REV. 1793, 1797 (2021) (despairing of fundamental disagreements in our nation’s politics); Drutman, *supra* note 144 (explaining that the realignment of parties around issues of identity has been accompanied by increasing polarization around race and immigration).

¹⁵¹ Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2328 (1997) (“[S]tatus competition is intense because status is a relative good. One has more of it because others have correspondingly less.”).

¹⁵² See *supra* note 147 and accompanying text.

¹⁵³ DAVID W. SOUTHERN, *THE PROGRESSIVE ERA AND RACE: REACTION AND REFORM, 1900-1917*, at 35 (2005) (“The Party that initiated Reconstruction found that it no longer needed the South and its black voters to win national elections.”).

¹⁵⁴ *Id.* at 34-36; Jack M. Balkin, *Race and the Cycles of Constitutional Time*, 86 MO. L. REV. (forthcoming 2021) (manuscript at 29-30), (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3770410) (“[A]fter 1896, Republicans acquiesced in the South disenfranchising its black citizens and establishing one-party rule in the South.”).

of Jim Crow South, had become an unwieldy alliance of Northern Democrats, who were more likely to be racial moderates and liberals, and Southern Democrats, most of whom wanted to maintain Jim Crow policies.¹⁵⁵ This party system accommodated many kinds of bipartisan compromise, but it was badly designed for protecting the rights of racial minorities.¹⁵⁶

The Civil Rights Revolution put race at the forefront of American politics, and this led not only to party realignment—with White racial conservatives fleeing the Democratic Party and becoming Republicans—but also to increasing party polarization.¹⁵⁷ The Republican Party figured out that emphasizing issues of race, religion, culture, and morality was the best way to break apart the Democrats' New Deal coalition.¹⁵⁸ With the emergence of the culture wars in the 1960s and 1970s, politics slowly reorganized around questions of identity.¹⁵⁹ This helped the Republican Party become the dominant party in the last part of the twentieth century and the early twenty-first century. But it also fostered increasing political polarization.¹⁶⁰

¹⁵⁵ See, e.g., Miller & Schofield, *Transformation*, *supra* note 143, at 437-38 (explaining the “problematic” nature of the New Deal coalition).

¹⁵⁶ See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 17-18 (2013) (pointing out that New Deal politics rested on a Faustian bargain concerning race).

¹⁵⁷ See Pildes, *supra* note 139, at 287-97 (arguing that the Voting Rights Act of 1965, which broke the Democrats' one-party control of the South, is an important cause of polarization).

¹⁵⁸ See DIONNE, *supra* note 146, at 12 (arguing that cultural issues allowed Republicans to split the New Deal coalition); THOMAS BYRNE EDSALL WITH MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 98 (1992) (“Race was central, Nixon and key Republican strategists began to recognize, to the fundamental conservative strategy of establishing a new, noneconomic polarization of the electorate . . .”).

¹⁵⁹ See JOHN SIDES, MICHAEL TESLER & LYNN VAVRECK, *IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA* 214-15 (2018) (discussing current structure of party competition organized around identity); Julia Azari & Marc J. Hetherington, *Back to the Future? What the Politics of the Late Nineteenth Century Can Tell Us About the 2016 Election*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 92, 99 (2016) (noting importance of party division along issues of race and culture in the First Gilded Age and today); Miller & Schofield, *Transformation*, *supra* note 143, at 439 (arguing that the political alignment of the parties during the New Deal “was eventually replaced, in the sixties and seventies, by a repositioning of the parties that left them more similar on economic policy and much more differentiated on social policy”); Miller & Schofield, *Activists*, *supra* note 141, at 254 (“Between 1960 and 2000, party differences along the economic cleavage line were replaced by a social cleavage between the two parties.”).

¹⁶⁰ See Lee Drutman, *Yes, the Republican Party Has Become Pathological. But Why?*, VOX (Sept. 22, 2017, 12:10 PM), <https://www.vox.com/polyarchy/2017/9/22/16345194/republican-party-pathological> [<https://perma.cc/5F7B-56L4>] (arguing that given the nature of their coalition, Republicans had good reason to adopt polarization strategies to ensure electoral success).

C. *Constitutional Rot and Renewal*

The third cycle that I discuss in the book consists of sporadic episodes of constitutional rot and constitutional renewal.¹⁶¹ These episodes of rot and renewal cross-cut the other two cycles—although polarization is a key ingredient in rot.¹⁶²

Constitutional rot refers to the processes by which governments become increasingly less democratic and less republican.¹⁶³ Rot is endemic to republics. A long tradition of political thought holds that republics are delicate institutions that are easily corrupted and hard to keep going.¹⁶⁴ The people lose civic virtue, the institutions break down, and the norms of trust that are necessary for multiparty competition decay.

The framers of our Constitution understood this.¹⁶⁵ Their study of history convinced them that every republic in history had eventually decayed, corrupted, and fallen into a mobocracy, an oligarchy, or what we today would call an authoritarian government.¹⁶⁶ They tried to design the new Constitution so that it would last as long as possible—so that it could ride out the bad times until the good times could return once again.¹⁶⁷ To a remarkable degree—and with the assistance of constitutional adaptations by later generations—they succeeded. The American republic has suffered through several episodes of republican decay, but they have been followed by periods of democratic renewal.

To be sure, the American system has never been fully democratic, and it has never been fully republican. The republic began with constitutional protections for slavery.¹⁶⁸ Women were not guaranteed a right to vote in national elections until 1920.¹⁶⁹ Our modern conception of civil liberties is only about half a century old.¹⁷⁰ So the idea of rot is only relative; it refers to backsliding from an already imperfect baseline of democracy and republicanism.¹⁷¹ And there has

¹⁶¹ BALKIN, CYCLES, *supra* note 1, at 44-65.

¹⁶² *Id.* at 49-50.

¹⁶³ *Id.* at 44.

¹⁶⁴ *See id.*

¹⁶⁵ *See id.* at 47-48.

¹⁶⁶ *See id.* at 47.

¹⁶⁷ *See id.* at 47 (“[The founders] drafted their new constitution with various devices to try to limit the cycle of republican rot, to have things bottom out before the country turned to mob rule, oligarchy, or dictatorship.”).

¹⁶⁸ *See generally* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (3d ed. 2014) (showing how the early republic both protected slavery and depended on the ownership and exploitation of slave labor).

¹⁶⁹ *See* U.S. CONST. amend. XIX.

¹⁷⁰ *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000f); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE, at xi-xii, 3 (1998) (describing the profound transformations in civil rights and civil liberties during the 1950s and 1960s).

¹⁷¹ *See* BALKIN, CYCLES, *supra* note 1, at 45.

been one period of constitutional collapse—the Civil War—in which our system of government broke down and required a reconstruction of the republic in order to renew it.¹⁷²

Like the cycle of regimes and the cycle of polarization, the cycle of rot and renewal is also produced by constitutional structures, but it depends on these structures in a different way. If one is to believe the ancient authors, rot in political institutions is inevitable because people are always grasping for power. Civic virtue is hard to maintain. A successful constitution is not one that avoids rot altogether. It is one that can ride out the inevitable episodes of decay and still make a comeback.

If a constitution succeeds at this, it is quite remarkable, for things that become rotten usually do not get better as time goes on. So the fact that there *is* a cycle of rot and renewal in American history is not a natural feature of politics. It is a marker of the Constitution's signal success. History teaches that rot will eventually come to all republics.¹⁷³ If the constitutional system did not come back from these episodes of decay, then it would simply break down and there would be a succession of different forms of government—and not necessarily democratic republics. Richard Albert makes a similar point when he argues that in most countries, when the system of government becomes unworkable, political leaders (or the people) enact a new constitution, and, hopefully, a new republic.¹⁷⁴ By contrast, the Americans have adapted, amended, and adjusted their old Constitution, and kept going.¹⁷⁵

Thus, the cycle of rot and renewal is not a law of politics. It is an index of the durability of our particular constitutional system. Our system keeps bouncing back from the forms of democratic decay that have done in many other republics before it. But that durability comes with a price. Our constitutional and political system is unwieldy, and it prevents a lot of potentially valuable change. These features are what I call republican insurance. They are the premium we pay for a durable and long-lasting constitution.

A central question for American constitutional theory is whether our system's resistance to rapid change will finally be its undoing, or whether pent-up frustrations will produce mobilizations that successfully renew American democracy. Perhaps if Americans could reform their system in time, they could halt and reverse the decay in our institutions, but the multiple roadblocks and veto points in the system will prevent this from happening. The system of republican insurance that worked well enough in the past may be part of the problem today.

At some point, even the best designed constitution will break down. It happened to the United States in the 1860s, and the system had to be reconstructed. Someday, it will happen again, and the constitutional system

¹⁷² See U.S. CONST. amends. XIII, XIV, XV.

¹⁷³ BALKIN, *CYCLES*, *supra* note 1, at 47.

¹⁷⁴ See Albert, *supra* note 35, at 1811-13.

¹⁷⁵ See *id.*

crafted in 1787 and continuously adapted over time will come to an end. The point of constitutional and political reform is to keep that day off for as long as possible.

Has that day finally come?

IV. A PIVOTAL MOMENT

In *Cycles*, I argue that the United States is at a pivotal moment in its constitutional development.¹⁷⁶ The Reagan regime appears to be ending, and the Republican Party is losing its long political dominance. The regime is weakened and debilitated, but a new regime has not yet arisen to take its place.

Periods of transition when an old regime has broken down are often confusing. But that is not the most serious problem. The United States is also suffering from dangerously high levels of party polarization. We are in a period of mutual enmity and hatred that we have not seen since the Civil War.¹⁷⁷ When the Reagan regime began in the 1980s, there was considerable overlap between the views of the two parties, and many bipartisan projects were possible.¹⁷⁸ That is not the case today. The parties agree on very little, and each fears that the other will destroy the country. In particular, the old order, represented by the Republican Party, cannot bear the thought of losing power to a new multiracial regime led by the Democrats, who, many Republicans fear, will impose socialism and persecute conservative Christians.¹⁷⁹

Because of deep polarization and rampant distrust, this transition between regimes is likely to be very different from the last two transitions in the 1930s and the 1980s. Both occurred in a relatively depolarized politics in which the parties' values and commitments still overlapped to a significant degree.¹⁸⁰ Today, by contrast, Republicans fear that if they lose political dominance, they will lose everything.¹⁸¹ As a result, the Republican Party is trying everything in its power to prevent a new regime from taking root. States controlled by Republicans have been increasingly prone to democratic retrogression even

¹⁷⁶ BALKIN, *CYCLES*, *supra* note 1, at 6-7 (describing the moment as one of transition).

¹⁷⁷ Laura Paisley, *Political Polarization at Its Worst Since the Civil War*, USC NEWS (Nov. 8, 2016), news.usc.edu/110124/political-polarization-at-its-worst-since-the-civil-war-2/ [<https://perma.cc/7WFL-RFDT>] (discussing the current level of political polarization in the United States); Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 *POLITY* 411, 413 (2014) (finding that the level of congressional polarization is the highest since the close of the Civil War).

¹⁷⁸ See Drutman, *supra* note 130.

¹⁷⁹ David French, *Evangelicals Are Supporting Trump Out of Fear, Not Faith*, TIME (June 27, 2019, 6:49 AM), <https://time.com/5615617/why-evangelicals-support-trump/> ("Talk to engaged evangelicals, and fear is all too often a dominant theme of their political life. The church is under siege from a hostile culture. Religious institutions are under legal attack from progressives.").

¹⁸⁰ See Drutman, *supra* note 130.

¹⁸¹ Balkin, *Last Days of Disco*, *supra* note 75, at 1191.

before January 6, 2021, and Trump's Big Lie.¹⁸² Since the 2020 election they have accelerated these antidemocratic tendencies.¹⁸³ As a result, Republicans have a good chance of changing the rules of politics sufficiently to block the ascension of a new dominant party for some time to come.

Issues of race, culture, religion, and identity have only made the problems worse. Over the course of four decades, the Republican Party increasingly has become a White person's party, and politicians have used issues of race, culture, religion, and identity to motivate the Party's base of White voters.¹⁸⁴ As the country becomes more multiracial and multicultural, racially conservative Whites in the Party increasingly fear their loss of status.¹⁸⁵ In like fashion, as the country became more secular and the sexual revolution progressed, conservative Christians in the Party have feared that Christianity will lose its dominant status as the country's characteristic religion.¹⁸⁶ Donald Trump played on these fears of status anxiety and cultural marginalization.¹⁸⁷ He campaigned on the promise

¹⁸² Jacob M. Grumbach, *Laboratories of Democratic Backsliding* (Apr. 5, 2021) (unpublished manuscript) (available at https://www.google.com/url?q=https%3A%2F%2Fwww.dropbox.com%2Fs%2Fc682q88keqycp6s%2Fgrumbach_laboratories_of_democratic_backsliding.pdf%3Fraw%3D1&sa=D&sntz=1&usg=AFQjCNENOLnNunOYFK0GXabqBdPw_XYUhA) (arguing that Republican control of state government correlates with democratic backsliding in that state).

¹⁸³ See *Voting Law Roundup: July 2021*, *supra* note 18 (summarizing state lawmakers' initiatives to curb voting).

¹⁸⁴ STEVENS, *supra* note 147, at 25 (describing conscious strategies to appeal to race to attract White voters to the Republican Party); Steve Peoples, *Analysis: A Reckoning on Racism? Not for Many Leaders of GOP*, ASSOCIATED PRESS (Apr. 26, 2021), <https://apnews.com/article/politics-death-of-daunte-wright-race-and-ethnicity-government-and-politics-george-floyd-98504669d2baac0f061ca920a52d6ab2> [<https://perma.cc/YJY6-7TH5>] ("As America grows more diverse, the Republican Party continues to be led almost entirely by white people, particularly men, who cater to an overwhelmingly white base. And despite fierce criticism from civil rights leaders and growing concern from business leaders who are traditional allies, many Republicans see no problem.").

¹⁸⁵ See Daniel Cox, Rachel Lienesch & Robert P. Jones, *Beyond Economics: Fears of Cultural Displacement Pushed the White Working Class to Trump*, PUB. RELIGION RSCH. INST. (May 9, 2017), <https://www.prii.org/research/white-working-class-attitudes-economy-trade-immigration-election-donald-trump/> [<https://perma.cc/3BQV-3UA5>]; Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115 PNAS E4330, E4330 (2018), <https://www.pnas.org/content/pnas/115/19/E4330.full.pdf> [<https://perma.cc/8UW6-HHWC>] ("Evidence points overwhelmingly to perceived status threat among high-status groups as the key motivation underlying Trump support."); Niraj Chokshi, *Trump Voters Driven by Fear of Losing Status, Not Economic Anxiety, Study Finds*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/us/politics/trump-economic-anxiety.html> ("White, Christian and male voters, the study suggests, turned to Mr. Trump because they felt their status was at risk.").

¹⁸⁶ See Cox et al., *supra* note 185 ("Nearly eight in ten (79%) white working-class evangelical Protestants express fear that the country is losing its culture and identity, compared to 56% of those who are religiously unaffiliated."); French, *supra* note 179.

¹⁸⁷ See BALKIN, CYCLES, *supra* note 1, at 55.

that he would “Make America Great Again,” that is, restore the older status order now slipping away.¹⁸⁸

As the Democrats have increasingly become a multiracial and cosmopolitan party, and the Republicans have increasingly become a party of Christian nationalism and White grievance, the two parties share fewer values and policy goals in common.¹⁸⁹ Each distrusts the other and fears the other party gaining power.

Polarization and loss of trust are major factors in constitutional rot.¹⁹⁰ And indeed, we are in the depths of a distressing period of constitutional rot, featuring a corrupt and blinkered politics, the breakdown of norms of cooperation between politicians of different parties, and the public’s deep distrust of the country’s elites and institutions. The neoliberal policies of the Reagan regime, which produced increasing wealth inequality and failed adequately to meet the challenges of globalization, have also greatly contributed to constitutional rot.¹⁹¹

Republican voters, deeply distrustful of Democrats and fearful of changes in the country’s demography, have become increasingly frustrated with democracy and attracted to “the use of force as a way to arrest the decline of the traditional American way of life.”¹⁹² Because the two parties do not trust each other, and because Republicans fear losing power, some Republican politicians and political operatives have begun hedging their commitments to democracy—that

¹⁸⁸ See sources cited *supra* note 185.

¹⁸⁹ See Bradley Jones, *Republicans and Democrats Have Grown Further Apart on What the Nation’s Top Priorities Should Be*, PEW RSCH. CTR. (Feb. 5, 2019), <https://www.pewresearch.org/fact-tank/2019/02/05/republicans-and-democrats-have-grown-further-apart-on-what-the-nations-top-priorities-should-be/> [https://perma.cc/84E8-XTTJ] (“Republicans and Democrats have been moving further apart not just in their political values and approaches to addressing the issues facing the country, but also on the issues they identify as top priorities for the president and Congress to address.”).

¹⁹⁰ BALKIN, CYCLES, *supra* note 1, at 49-50.

¹⁹¹ See JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY 5 (2020) [hereinafter HACKER & PIERSON, LET THEM EAT TWEETS] (describing the development of “plutocratic populism” which employs polarizing politics to generate increasing wealth inequality); HACKER & PIERSON, *supra* note 65, at 134 (noting importance of changes in tax laws in producing “winner-take-all outcomes”).

¹⁹² Daniel A. Cox, *After the Ballots Are Counted: Conspiracies, Political Violence, and American Exceptionalism*, SURV. CTR. ON AM. LIFE (Feb. 11, 2021), <https://www.americansurveycenter.org/research/after-the-ballots-are-counted-conspiracies-political-violence-and-american-exceptionalism/> [https://perma.cc/AY5D-4VLT] (“A majority (56 percent) of Republicans support the use of force as a way to arrest the decline of the traditional American way of life.”); see Zack Beauchamp, *The Republican Revolt Against Democracy, Explained in 13 Charts*, VOX (Mar. 1, 2021, 7:30 AM), <https://www.vox.com/policy-and-politics/22274429/republicans-anti-democracy-13-charts> (noting voter surveys suggesting that “Republicans are increasingly willing to endorse anti-democratic political tactics and ideas”).

is, to the principle that parties that lose elections should give up power.¹⁹³ They fear that the new regime will impose socialism and destroy America. Hence, increasing numbers of Republicans want to hold on to power even if they lack the support of a national majority.¹⁹⁴

Republican politicians understand that they enjoy multiple structural advantages that do not require them to win national or state majorities in order to stay in power.¹⁹⁵ As a result, Republicans have become increasingly attracted to a model of minoritarian government in which majorities do not get to rule unless they overcome multiple hurdles or win elections by overwhelming margins.¹⁹⁶

Minoritarian government is hardly new in the United States. For most of the country's history the majority of its adult inhabitants could not vote.¹⁹⁷ But the principle of majority rule has been a deep and powerful principle of American politics from the Founding era onward.¹⁹⁸ The principle of majority rule has continuously spurred movements for political and constitutional reform. It is reflected in many of the constitutional amendments enacted since the Founding: the Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth and Twenty-Sixth Amendments all expanded the right to vote in various ways to help ensure that majorities rule.¹⁹⁹ The principle of majority rule has

¹⁹³ HACKER & PIERSON, LET THEM EAT TWEETS, *supra* note 191, at 4 (arguing that Republican leaders have turned to antidemocratic measures to remain in power and continue strategies of upward wealth redistribution); Ronald Brownstein, *Is the GOP's Extremist Wing Now Too Big to Fail?*, CNN (Feb. 14, 2021, 2:48 PM), <https://www.cnn.com/2021/02/14/politics/republican-extremism-trump-impeachment/index.html> [<https://perma.cc/LM52-XZZS>] (explaining that Republican politicians have normalized extremism in their supporters and are unwilling to rein in their antidemocratic tendencies).

¹⁹⁴ HACKER & PIERSON, LET THEM EAT TWEETS, *supra* note 191, at 5 (detailing Republican strategies for maintaining minority rule).

¹⁹⁵ *Id.* at 13 (“[I]n an age of polarization, key features of that system—from the tilt of the Senate and Electoral College toward rural states, to the growing role of the Senate filibuster, to the vulnerability of state-administered elections to partisan rigging, to the conservative capture of the courts—allow a more and more determined minority to not just resist the will of a majority but increasingly to rule over it.”).

¹⁹⁶ See Adam Jentleson, *How to Stop the Minority-Rule Doom Loop*, ATLANTIC (Apr. 12, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/how-stop-minority-rule-doom-loop/618536/> (describing interlocking effects of voter suppression, gerrymandering, and control of the presidency and Senate, which make it easier for Republicans to win future elections and also “retain a veto over the agenda of the majority, which [Republicans] use to block change and feed the conservative case that the government is ‘broken’”).

¹⁹⁷ See *Who Got the Right to Vote When? A History of Voting Rights in America*, AL JAZEERA, <https://interactive.aljazeera.com/aje/2016/us-elections-2016-who-can-vote/index.html> [<https://perma.cc/GB8D-RVRU>] (last updated Aug. 18, 2020).

¹⁹⁸ Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 786 (1994) (“The central meaning of Republican Government [for the Founders] revolved tightly around popular sovereignty, majority rule, and the people’s right to alter or abolish.”).

¹⁹⁹ U.S. CONST. amends. XIV, XV, XVII, XIX, XXIII, XXIV, XXVI.

become even more central to American constitutionalism since the Warren Court's reapportionment revolution, the Civil Rights Revolution, and the Voting Rights Act of 1965.²⁰⁰ Thus, if Republicans manage to entrench minoritarian rule today, it would be a significant retrogression of American democracy, even if past generations had far less majoritarian systems than we do today.

A. *Signs of a New Regime?*

The Cycles of Constitutional Time concludes at the very beginning of 2020. Over a year later, things have hardly gotten less troubling: not one but two presidential impeachments, a global pandemic, Trump's Big Lie, his repeated attempts to overturn the election, and a violent attack on the U.S. Capitol.

The 2020 elections did not provide a clear conclusion to the Reagan regime. Quite the contrary: the Democratic Party did not win a decisive victory in the 2020 elections.²⁰¹ Its presidential candidate, Joe Biden, had no coattails. The Party actually lost seats in the House and barely gained a majority in the Senate through two runoff elections in Georgia.²⁰² Instead, the election only signaled possibilities. The COVID-19 pandemic and the economic contraction that followed it have handed the Democrats the opportunity to create a new regime, with a new dominant party, and a new set of commitments of interest and ideology. But we do not yet know whether they will successfully capitalize on the narrow window of opportunity available to them in the next several years.

Democrats have blown their chances before. They failed to inaugurate a new regime in 1896, and they proved unable to do so once again in 2008.²⁰³ The January 6 insurrection certainly seems like a watershed event. We may well be at a crucial turning point in American history. But if so, we will only know in hindsight. It took many years for the Reagan regime to establish itself; the New Deal regime was confirmed only after Roosevelt's landslide victory in 1936.

The future remains uncertain and likely to surprise us. But I will venture to say that much depends on whether the Democratic Party is able to mobilize and take advantage of its narrow window of opportunity and its current razor-thin majorities in the House and Senate. The Democratic Party needs to modify the current Senate filibuster rules in order to pass two different kinds of legislation in a fairly short space of time.

²⁰⁰ HORWITZ, *supra* note 170, at 85 (arguing that under the Warren Court, "democracy—the right to an equally effective vote—had evolved to become the foundational constitutional ideal").

²⁰¹ Geoffrey Skelley, *Republicans Are on Track to Take Back the House in 2022*, FIFTYTHREE (Nov. 12, 2020, 7:00 AM), <https://fivethirtyeight.com/features/republicans-2020-gains-in-the-house-set-them-up-well-for-2022/>.

²⁰² *See id.* (listing lost seats); Nathaniel Rakich, Geoffrey Skelley, Laura Bronner & Julia Wolfe, *How Democrats Won the Georgia Runoffs*, FIFTYTHREE (Jan. 7, 2021, 2:47 PM), <https://fivethirtyeight.com/features/how-democrats-won-the-georgia-runoffs/>.

²⁰³ BALKIN, *CYCLES*, *supra* note 1, at 17, 27.

The first kind of legislation is *constituency-building* legislation, which increases and fortifies the ascendant party's winning coalition while draining support from the other party. Some of this legislation can be passed through reconciliation rules that skirt the Senate filibuster rules.²⁰⁴ But other legislation requires filibuster reform.²⁰⁵

Constituency-building legislation might include new social-welfare legislation that successfully deals with the pandemic, expands access to health care and college education, supports children and families, and makes local investments and improvements to the country's infrastructure. New social programs restructure the relationships between families, civil society, and the state. They create constituencies for their continuation, expansion, and preservation. An older example is the Social Security Act.²⁰⁶ A contemporary example is the new child-tax benefit in the American Rescue Plan Act.²⁰⁷ The ARPA was one of Biden's first achievements as President, and passed through the reconciliation rules.²⁰⁸

Constituency-building actions are designed to convince independent voters and some members of the other party that the Democrats can effectively respond to the country's problems, thereby splitting existing Republican constituencies and helping the ascendant party generate a stable majority coalition. Equally important, successfully passing these new laws and programs would send a strong signal that a new political regime has taken hold and that a new dominant party has changed the central agendas of American politics.

Constituency-building legislation is also designed to move past older fights and start new ones. It is no accident that Republicans have responded to President Biden's proposals on the pandemic and infrastructure by going back

²⁰⁴ See, e.g., Richard Kogan & David Reich, *Introduction to Budget "Reconciliation,"* CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/federal-budget/introduction-to-budget-reconciliation> [<https://perma.cc/6P99-4TSM>] (last updated Jan. 21, 2021) ("In the Senate, reconciliation bills aren't subject to filibuster and the scope of amendments is limited, giving this process real advantages for enacting controversial budget and tax measures.").

²⁰⁵ See, e.g., Kelsey Snell, *Senate Can't Vote on \$15 Minimum Wage, Parliamentary Rules*, NPR (Feb. 25, 2021, 7:48 PM), <https://www.npr.org/2021/02/25/970637190/senate-cant-vote-on-15-minimum-wage-parliamentary-rules> [<https://perma.cc/6JZS-UTTL>].

²⁰⁶ BALKIN, CYCLES, *supra* note 1, at 51.

²⁰⁷ See MARGOT L. CRANDALL-HOLLOCK, CONG. RSCH. SERV., IN11613, THE CHILD TAX CREDIT: TEMPORARY EXPANSION FOR 2021 UNDER THE AMERICAN RESCUE PLAN ACT OF 2021 (ARPA; P.L. 117-2) 1 (2021); see also American Rescue Plan Act of 2021, Pub. L. No. 117-2, 2021 U.S.C.A.N. (135 Stat.) 4 (providing monetary relief to Americans in response to COVID-19 pandemic and other economic problems).

²⁰⁸ MOLLY F. SHERLOCK, JANE G. GRAVELLE & MARGOT L. CRANDALL-HOLLOCK, CONG. RSCH. SERV., R46680, THE AMERICAN RESCUE PLAN ACT OF 2021 (ARPA; P.L. 117-2): TITLE IX, SUBTITLE G—TAX PROVISIONS RELATED TO PROMOTING ECONOMIC SECURITY 1 (2021).

to the well once more and attempting to dredge up new culture war issues.²⁰⁹ Prosecuting culture wars has been central to Republican electoral success for decades, and the Republican leadership would dearly love to return to that old-time religion. The conservative Supreme Court majority may also help shape the grounds of political contention to the extent that it places culture-war issues like abortion, affirmative action, gun rights, LGBTQ rights, and religious liberty at the forefront of public consciousness.²¹⁰

The challenge for the Democratic Party is to change the central questions of politics—and the central issues on which the two parties face off—to questions of economics, infrastructure, jobs, taxation, education, health care, and support for children and families in ways that successfully avoid being recast in terms of cultural combat. As I note in *Cycles*, if Democrats succeed in doing this, they will create cracks in the Republican coalition that may help begin a new cycle of depolarization.²¹¹

The second kind of legislation is *politics-restructuring*. Its purpose is to change the background conditions of political competition. Examples are the proposed new Voting Rights Act²¹² and the For the People Act,²¹³ which attempt to reform the existing political system and protect voting rights. In particular, the goal is to prevent Republican-controlled state and local governments from attempting to lock in Republican advantages for many years to come, through gerrymandering and by making registration and voting more difficult. In addition to new voting rights laws, admitting new states to the Union, such as Washington, D.C., and Puerto Rico, would help ameliorate the Senate's malapportionment.

²⁰⁹ Reid Wilson, *GOP Sees Critical Race Theory Battle as Potent Midterm Weapon*, HILL (June 22, 2021, 8:26 PM), <https://thehill.com/homenews/campaign/559732-republicans-see-critical-race-theory-as-new-front-in-ongoing-culture-wars> [https://perma.cc/S54F-P7JN] (“Top Republicans are embracing opposition to critical race theory in schools as a new front in the culture wars aimed at exciting their voters ahead of both off-year and midterm elections.”); Carl Hulse, *Republicans Amplify Culture-War Issues in Bid to Regain Power*, N.Y. TIMES, May 8, 2021, at A15, (“Republicans are mostly steering clear of Democrats’ economic initiatives that have proved popular, such as an infrastructure package and a stimulus law that coupled pandemic relief with major expansions of safety-net programs, and are focusing instead on polarizing issues that stoke conservative outrage.”); Michael Warren, *Faced with Biden’s Popular Covid Law, Republicans Stick to the Culture War*, CNN (Mar. 11, 2021, 1:37 PM), <https://www.cnn.com/2021/03/11/politics/biden-republicans-culture-war-covid-relief/index.html> [https://perma.cc/BE6F-MPNJ].

²¹⁰ Andrew Chung & Lawrence Hurley, *Analysis: Supreme Court Jumps into U.S. Culture Wars with Abortion, Gun Cases*, REUTERS (May 18, 2021, 1:00 PM), <https://www.reuters.com/world/us/supreme-court-jumps-into-us-culture-wars-with-abortion-gun-cases-2021-05-18/> [https://perma.cc/M5TT-DNDR].

²¹¹ See BALKIN, *CYCLES*, *supra* note 1, at 172-73 (noting that “the populist/working-class wings of both parties have overlapping interests”).

²¹² John Lewis Voting Rights Advancement Act of 2020, S. 4263, 116th Cong. (2020).

²¹³ For the People Act of 2021, H.R. 1, 117th Cong. (2021).

It is probably not an accident that the structures of political competition in the late Reagan regime favor the regime's dominant party, the Republican Party. Accordingly, a party bidding to start a new regime and achieve lasting political dominance must try to remake the existing structures of political competition in its own image and to its own benefit.²¹⁴

Democrats well understand the difficulties of the current political environment. Without significant reforms, Republicans enjoy a host of structural advantages in state legislatures, the United States House, the Senate, and the Electoral College.²¹⁵ These, in turn, have given the Republican Party significant advantages in stocking the federal judiciary with ideological allies.²¹⁶ On top of this, Republicans in the states, who recognize Democrats' likely demographic advantages in the future, are trying to tilt the political playing field even further in their own favor.²¹⁷ These structural advantages may allow Republicans to continue to control national and state governments without winning majority support.

For example, the partisan lean of the median House seat tilts toward the Republicans, which means that Democrats can win a national majority of the

²¹⁴ See Graber, *Belling the Partisan Cats*, *supra* note 54, at 645 (2014) ("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."); Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment 7-8* (Univ. of Md. Francis King Carey Sch. of L., Working Paper No. 2014-37, 2014) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483355) ("Republicans when drafting the Fourteenth Amendment sought to avoid a repeat of such constitutional perversions as *Dred Scott* by constructing a constitutional politics that guaranteed to the extent feasible that the persons who remained loyal to the Union during the Civil War, white and black, would control the meaning of the post-Civil War Constitution.").

²¹⁵ See Klarman, *supra* note 38, at 232-37; Laura Bronner & Nathaniel Rakich, *Advantage, GOP*, FIVETHIRTYEIGHT (Apr. 29, 2021), <https://fivethirtyeight.com/features/advantage-gop/>; Seth Masket, *It's Dangerous When the Minority Party Rules Everyone Else*, WASH. POST (Sept. 25, 2020, 10:10 AM) https://www.washingtonpost.com/outlook/minority-party-electoral-college-court-trump/2020/09/25/1163b954-fdfc-11ea-8d05-9beaaa91c71f_story.html; *America's Electoral System Gives the Republicans Advantages over Democrats*, ECONOMIST (July 12, 2018), <https://www.economist.com/briefing/2018/07/12/americas-electoral-system-gives-the-republicans-advantages-over-democrats>; Ian Millhiser, *America's Democracy Is Failing. Here's Why.*, VOX (Jan. 13, 2021, 3:36 PM), <https://www.vox.com/policy-and-politics/2020/1/30/20997046/constitution-electoral-college-senate-popular-vote-trump>.

²¹⁶ See, e.g., Bronner & Rakich, *supra* note 215 ("From 2017 to 2021, more than 220 judges, including three Supreme Court justices, were appointed by a president who lost the popular vote and confirmed by a Senate that a majority of voters didn't choose."); Masket, *supra* note 215 ("Should a Trump nominee be confirmed, the Supreme Court will consist of six justices appointed by Republicans, even though the party has won the popular presidential vote only once in the past seven elections (George W. Bush, in 2004).").

²¹⁷ Bronner & Rakich, *supra* note 215.

popular vote for the House and still fail to win a majority of House seats.²¹⁸ Because Republican voters are more efficiently distributed in key states, Democrats can lose the Electoral College even if they win the popular vote by a sizeable margin.²¹⁹ In 2020, for example, Joe Biden won the popular vote by 4.5%. But a shift of 45,000 votes in three states would have given Donald Trump a tie in the Electoral College.²²⁰ The election would have then been thrown into the House of Representatives, and because there are more Republican-controlled delegations in the House, Trump would have likely gotten a second term as President.²²¹ If Democrats do nothing to restructure the rules of politics, Republicans have a good chance of maintaining power as a minoritarian government, even as the demographics of the country change in the Democrats' favor.

Passage of constituency-building programs has already begun with the American Rescue Plan Act. But the political process reforms that would cement a new regime have not yet occurred. Democrats currently lack the votes in the Senate to pass voting rights legislation or admit new states.²²² Even if they modify the Senate rules—a big *if*—the new voting rights laws must still pass through the gauntlet of constitutional and legal challenges. Those challenges will be heard by a conservative Supreme Court majority, which has generally been deferential to Republican-sponsored laws and litigation positions that make

²¹⁸ David Wasserman, *The Congressional Map Has a Record-Setting Bias Against Democrats*, FIFTYEIGHT (Aug. 7, 2017, 5:54 AM), <https://fivethirtyeight.com/features/the-congressional-map-is-historically-biased-toward-the-gop/> (“In 2016, Trump lost the national popular vote by 2.1 percentage points, but Republicans won the median House seat by 3.4 points and the median Senate seat by 3.6 points — that’s the widest Senate gap in at least a century and tied with 2012 for the widest House disparity in the last half-century.”); Bronner & Rakich, *supra* note 215 (noting that in the 2020 election, “Biden won the median House seat (Illinois’s 14th District) by 2.4 percentage points, meaning it was still 2.1 points redder than the country as a whole”).

²¹⁹ Bronner & Rakich, *supra* note 215 (“President Joe Biden won the national popular vote by 4.5 percentage points, yet he won Wisconsin — the state that gave him his decisive 270th electoral vote—by only 0.6 points.” (footnote omitted)).

²²⁰ William A. Galston, *The Electoral College Is a Ticking Time Bomb*, BROOKINGS (Dec. 9, 2020), <https://www.brookings.edu/blog/fixgov/2020/12/09/the-electoral-college-is-a-ticking-time-bomb/> [<https://perma.cc/6QMG-T23G>] (“[I]f President Trump had received 11,000 more votes in Arizona, 13,000 more in Georgia, and 20,000 more in Wisconsin, 37 electoral votes would have moved into his column, producing a tie (269 to 269) in the Electoral College.”).

²²¹ *Id.* (“In the new Congress that [convened in January 2021], Republicans [held] the majority in 27 state delegations, Democrats just 19. . . . If a tie vote had reached the House, Donald Trump would have been reelected, despite receiving more than 6 million fewer votes than his Democratic adversary.”).

²²² See *supra* text accompanying notes 204-05 (discussing Democrats’ political predicament).

voting more difficult.²²³ Indeed, in 2013, the Supreme Court's conservative majority crippled the federal Voting Rights Act, rendering its preclearance provisions unenforceable.²²⁴ This presaged a wave of voting restrictions in the states that created the present need for new voting rights legislation.²²⁵ And this Term the Supreme Court's conservative Justices weakened the Voting Rights Act even further, making it harder to challenge these new restrictions in court.²²⁶

All other things being equal, conservative Justices appointed by conservative Republicans are more likely to be sympathetic to the arguments of Republican-controlled legislatures and more willing to strike down or hobble any Democratic-sponsored reforms that manage to make it through the Senate. That is one reason why control of the federal judiciary has been so important to Republicans during the Reagan regime. With the assistance of a friendly judiciary, Republicans may be able to keep a new regime from displacing them.

CONCLUSION: THREE PATHS FORWARD

What happens next? I see at least three possible paths.

The first, described in *Cycles*, is that America transitions successfully from the older, neoliberal Reagan regime to a new political and constitutional regime with a new dominant coalition, a new dominant party, and a different set of commitments of interest and ideology.²²⁷

These changes, as well as the country's changing demographics, will eventually reshape the major party coalitions. These two coalitions, which currently face off against each other on issues of race, culture, religion, and identity, will very slowly reorient themselves around a new set of issues.²²⁸ For this to happen, however, the ascendant party, the Democrats, will have to win a series of elections and reshape the rules of politics through a series of reforms, which, as noted above, must include changing the filibuster rules of the Senate.

²²³ See HASEN, *supra* note 32, at 37, 129 ("There's no getting around the fact that judges appointed by Democratic or Republican presidents tend to see the issue of voter suppression differently.").

²²⁴ See *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (striking down preclearance formula of Section 4 of the Voting Rights Act).

²²⁵ *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder> [<https://perma.cc/J76X-NWDN>] ("The decision in *Shelby County* opened the floodgates to laws restricting voting throughout the United States. . . . [S]tates previously covered by the preclearance requirement have engaged in recent, significant efforts to disenfranchise voters.").

²²⁶ See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (holding that voting regulations, including those aimed at preventing potential voter fraud, that have a disparate impact on minorities, do not violate Section 2 of the Voting Rights Act, as long as voting is "equally open" to all).

²²⁷ BALKIN, *CYCLES*, *supra* note 1, at 170.

²²⁸ *Id.* at 171-74.

A second possible path, also described in *Cycles*, is a Trumpist revival.²²⁹ Democrats prove unable to transform their razor-thin majorities into lasting dominance. They fail to deal adequately with the pandemic, the country's economic problems, or some other highly salient issue such as trade, foreign policy, or immigration. Because of internal differences within their coalition, Democrats fail to alter the filibuster, and they are unable to enact the political reforms necessary to counteract Republicans' structural advantages in state legislatures and in the national House, Senate, Electoral College, and federal judiciary. Or Democrats do manage to pass reforms, but conservative Republican-appointed judges and Justices strike the reforms down or hobble them. Republicans reconstitute themselves as a Trumpist party devoted to bare-knuckled capitalism, conservative Christianity, and white nationalism. They pass new voting laws to entrench themselves even more deeply in power, establishing minoritarian government. The conservative federal judiciary refuses to intervene and legitimates their work. Former President Trump, or someone aligned with him, leads a reconstructed party to victory in 2024 or 2028, and Republican dominance continues for a generation or more.

Ironically, the January 6, 2021, insurrection did not undermine the chances for such a Republican revival. Quite the contrary: the insurrection may have made it a bit more likely. Trump's campaign of lies and propaganda has convinced most Republican Party leaders and activists that the Party does not need to make any course corrections or become more tolerant and welcoming in order to expand its base.²³⁰ After all, a majority of Republicans believe that they *won* the presidential election, which was stolen from them.²³¹

Republicans at the state and local levels have become radicalized.²³² Trump's Big Lie is energizing state and local leaders to purge doubters and pass legislation that attempts to lock in Republican advantages.²³³ They believe that

²²⁹ *Id.* at 27-29.

²³⁰ See Perry Bacon Jr., *Why the Republican Party Isn't Rebranding After 2020*, FIVETHIRTYEIGHT (Apr. 6, 2021, 6:00 AM), <https://fivethirtyeight.com/features/why-the-republican-party-isnt-rebranding-after-2020/> [<https://perma.cc/6P32-NRKR>] ("The collective decision of conservative activists and Republican elected officials to stay on the anti-democratic, racist trajectory that the GOP had been on before Trump—but that he accelerated—is perhaps the most important story in American politics right now.").

²³¹ See sources cited *supra* note 21.

²³² See Bacon, *supra* note 17 ("The party's most-Trump and pro-Trumpism contingent and the forces in the party pushing its growing radical and antidemocratic tendencies are often not national Republicans, but those at the local and state levels.").

²³³ See *id.* ("Local and state-level Republican parties are sharply attacking and even formally censuring prominent figures in the party like [U.S. Representative Elizabeth] Cheney who have broken with Trump."); Nolan D. McCaskill, *After Trump's Loss and False Fraud Claims, GOP Eyes Voter Restrictions Across Nation*, POLITICO (Mar. 15, 2021, 4:30 AM), <https://www.politico.com/news/2021/03/15/voting-restrictions-states-475732> [<https://perma.cc/HB8C-TJFU>] ("In statehouses around the country—most notably, in

Democrats cannot be allowed to win any more elections through fraud. Whether or not Trump himself makes a comeback in 2024 (or even 2028), Trumpist candidates are waiting in the wings to lead the national party to victory.²³⁴

A third possibility is that we have neither a Trumpist revival nor a new Democratic regime because both parties prove too weak and compromised to successfully dominate national politics. The Republicans shed too many college-educated and younger voters, while the Democrats cannot overcome Republicans' multiple structural advantages, including the malapportioned Senate, the conservative Supreme Court majority, and the filibuster. The result is a long interregnum in which the parties remain strongly competitive.²³⁵ Bitterness and polarization will remain high. Political hardball and political dysfunction will continue and even increase. The result will be a protracted struggle for power with increasing social upheaval. Constitutional rot will proceed apace. Growing numbers of people may feel that violence is the only solution.

I am a professional optimist, and as I explain in *Cycles*, my hope is for something closer to the first scenario, in which the country escapes its exhausted political regime, and both major parties become fully multiracial coalitions. This will slowly cause the central issues of politics to shift from the culture-war questions of race, religion, culture, and identity, to issues of economics, distribution, public goods, and the environment. This, in turn, will slowly begin the process of depolarization, for reasons I describe in the book.²³⁶

There are no guarantees. All that we do know is that our political system is changing rapidly before our eyes. Who would have thought only a few years ago that our Capitol would be attacked? Things that once seemed unthinkable are now very much in the realm of possibility. Politics is re-forming, coalitions are shifting, and new issues and divisions are emerging, for better and for worse. As I explain in *Cycles*, the future of the American Constitution depends not on courts or constitutional theories but on political mobilization by the American people themselves.²³⁷ In their hands is the fate of our nation's precarious

Georgia—lawmakers are rolling out legislation that would make it a lot harder to vote.”); Rick Klein & Alisa Wiersema, ‘Big Lie’ Spreads into GOP Efforts to Limit Ballot Access, ABC NEWS (Mar. 2, 2021, 6:02 AM), <https://abcnews.go.com/Politics/big-lie-spreads-gop-efforts-limit-ballot-access/story?id=76186218> [<https://perma.cc/938E-LHC4>] (“[M]ore than 250 bills filed across 43 state legislatures this year would make it harder to vote . . .”).

²³⁴ Ronald Brownstein, *Why Republicans Still Can't Quit Trump*, ATLANTIC (June 11, 2020), <https://www.theatlantic.com/politics/archive/2020/06/republicans-2024-nominee-will-be-trump-acolyte/612925/> (“The 2024 GOP presidential nominee is highly likely to be an acolyte of the president’s.”).

²³⁵ See Scott Lemieux, *The Long Disjunction*, LAWS, GUNS & MONEY (May 16, 2019, 11:42 AM), <https://www.lawyersgunsmoneyblog.com/2019/05/the-long-disjunction> [<https://perma.cc/ZE9N-JZZL>] (arguing that conditions necessary for regime change are not present).

²³⁶ BALKIN, *CYCLES*, *supra* note 1, at 171-74.

²³⁷ *Id.* at 7, 10, 71, 150, 164.

democracy. They will determine whether our constitutional system can renew itself once again.