

**ROT AND RENEWAL: THE 2020 ELECTION IN THE CYCLES OF
CONSTITUTIONAL TIME**

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INTRODUCTION

Many people today worry that American democracy is in deep trouble. They are right to worry. My new book, *The Cycles of Constitutional Time*,¹ talks about these issues at length. Here I will merely summarize parts of the argument and apply them to the most recent election. My goal is to provide a little historical distance from our current difficulties, and to explain how we got to where we are now and where we are likely to be headed.

In *The Cycles of Constitutional Time*, I describe the American constitutional system in terms of cycles of expansion and contraction, rise and fall, decay and renewal.² By speaking in terms of cycles, I do not mean to suggest exact repetition, nor do I mean to suggest covering laws of history. Things will not happen the same way that they happened in the past, but, as Mark Twain is supposed to have said, although history may not repeat itself, it often does rhyme.³

With this in mind, I would like you to think about our current unhappy condition not as a single thing, but as a concatenation of different movements that together constitute what I call “constitutional time.”⁴ The goal is to figure out what constitutional time it is.

The first of these cycles is the rise and fall of political regimes and dominant political parties. The second is the waxing and waning of political polarization. And the third involves sporadic episodes of what I call “constitutional rot” that are usually followed by periods of constitutional renewal.

In the 2020 presidential election, the Democratic challenger, Joe Biden, defeated the Republican incumbent, Donald Trump. But following the election, Trump resisted accepting defeat for weeks, and instead sought to undermine confidence in the electoral system, making baseless allegations of widespread voter fraud that were repeated and elaborated by conservative media.⁵ Because of Trump’s skill as a propagandist and

1 JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020) [hereinafter BALKIN, *CYCLES*].

2 *Id.* at 6–7.

3 *See id.* at 5–7.

4 *Id.*

5 Philip Rucker et al., *20 Days of Fantasy and Failure: Inside Trump’s Quest to Overturn the Election*, WASH. POST (Nov. 28, 2020), https://www.washingtonpost.com/politics/trump-election-overturn/2020/11/28/34f45226-2f47-11eb-96c2-aac3f162215d_story.html; Toluse Olorunnipa et al., *Trump’s Assault on the Election Could Leave a Lasting Mark on American Democracy*, WASH. POST (Nov. 24, 2020), https://www.washingtonpost.com/politics/trump-election-democracy/2020/11/24/e78b8194-2e6a-11eb-bae0-50bb17126614_story.html; Jim Rutenberg & Nick Corasaniti, *Behind Trump’s Yearlong*

his charismatic authority over large parts of the Republican base, many Republican politicians were reluctant to admit that Biden had won and that Trump had lost.⁶

Matters came to a head on January 6, 2021, when Trump incited a violent mob to storm the Capitol building and try to stop members of Congress from completing the count of electoral votes that would certify Trump's loss and the legitimacy of the incoming Biden Administration.⁷ Even after the riots—which had put their own lives and the lives of their colleagues in danger—more than half of the Republican delegation in the House of Representatives and eight Republican Senators continued to try to contest the Electoral College results.⁸

The January 6th insurrection shocked Americans; it vividly displayed how deeply constitutional rot had advanced in the United States and how far American democracy had fallen. Although Trump did not succeed in preventing a new Biden Administration, he may well succeed in further undermining the norms of cooperation and trust that are crucial to American democracy.

What is the meaning of the 2020 election in terms of the cycles described in my book? In this essay, I will try to situate this election and

Effort to Turn Losing into Winning, N.Y. TIMES (Nov. 23, 2020), <https://www.nytimes.com/2020/11/15/us/politics/trump-voter-fraud-claims.html>; Amanda Seitz et al., *False Claims of Voting Fraud, Pushed by Trump, Thrive Online*, AP NEWS (Nov. 10, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-politics-media-1bf96bf3910bdcb0f125958357c8f1a>.

6 Tim Alberta, *The Inside Story of Michigan's Fake Voter Fraud Scandal*, POLITICO (Nov. 24, 2020), <https://www.politico.com/news/magazine/2020/11/24/michigan-election-trump-voter-fraud-democracy-440475>; Andrew Feinberg, *Conservative Insiders Say Republican Politicians Aren't Scared of Trump Now—They're Scared of His Supporters*, INDEPENDENT (Nov. 26, 2020), <https://www.independent.co.uk/voices/trump-fox-news-randy-quaid-giuliani-b1761138.html>.

7 Ed Pilkington, *Incitement: A Timeline of Trump's Inflammatory Rhetoric Before the Capitol Riot*, GUARDIAN (Jan. 7, 2021), <https://www.theguardian.com/us-news/2021/jan/07/trump-incitement-inflammatory-rhetoric-capitol-riot>; *Woman Dies After Shooting in U.S. Capitol; D.C. National Guard Activated After Mob Breaches Building*, WASH. POST (Jan. 7, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/06/dc-protests-trump-rally-live-updates/>; Maggie Haberman, *Trump Told Crowd 'You Will Never Take Back Our Country with Weakness'*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-speech-capitol.html>.

8 Barbara Sprunt, *Here Are the Republicans Who Objected to the Electoral College Count*, NPR (Jan. 7, 2021), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/07/954380156/here-are-the-republicans-who-objected-to-the-electoral-college-count> (noting that 138 Representatives and 7 Senators objected to the count of electors from Pennsylvania, and 121 Representatives and 6 Senators objected to the count of electors from Arizona, with 8 Senators raising objections to one of the two states).

explain what time it is. I will argue, first, that although the Reagan regime that has structured American politics since the 1980s is nearing its end, the 2020 election showed that we cannot yet be certain that it has reached its conclusion. The COVID-19 pandemic and the economic contraction that accompanied it have handed the Democrats an opportunity to forge a new political regime and new political realities, but whether they can successfully capitalize on these possibilities is yet to be determined. The book points out, for example, that the Democrats missed an opportunity to create a new regime in 1896 and proved unable to do so in 2008.⁹ Years later, we may retroactively identify the end of the Reagan regime with the 2020 election and the Capitol Hill insurrection that followed it. But we cannot say for sure at present.

Second, our deeply polarized politics will continue until party coalitions slowly begin to change, leading to a focus on a new set of issues. Those changes are already in motion, but the transformations will take time. Third, the gravest threat we face today is not polarization in and of itself but constitutional rot—a deepening decay in our political and legal institutions. This decay began well before the election of President Donald Trump. But Trump accelerated constitutional rot in the United States—by his creation of a cult of personality, by his abuses of power, and by his refusal to accept the legitimacy of the 2020 election and the opposition party’s ascension to power through democratic means.

9 See BALKIN, *CYCLES*, *supra* note 1, at 16–17.

I. CONSTITUTIONAL REGIMES

The United States has a presidential rather than a parliamentary system. It also has a party system organized around broad coalitions, usually involving two major political parties. Our system of first-past-the-post voting rules also encourages a two-party system.¹⁰ Finally, the staggered rules of elections—four years for the White House, six years for the Senate (with only a third of the Senate up for election at a time), two years for the House, and life tenure for federal judges—make it very difficult to gain control of all of the levers of power in the federal government.¹¹ These features of our system slow down political change. This frustrates revolutionary movements for change, and it causes pressures for change to build over long periods of time until they finally break through. Our constitutional system makes revolutionary changes in government infrequent but fairly large when they do occur.

Because of these features of our system, some of which are consequences of design and some of which are the result of contingency, our politics has a distinctive shape. It turns out to feature political regimes, long periods of time in which one party tends to dominate politics. It doesn't win all of the elections, but it wins most of them, and it sets the agenda for what is thought politically possible at a particular period of time.¹²

This organization of American politics into regimes occurs in part because the 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. If the United States had proportional representation and/or a multi-party system, it is doubtful that our politics would be organized into party regimes in the same way.

Another feature that makes political dominance hard to achieve is our presidential system, which separates control of the executive from control of the legislative branch. Compare our politics with a parliamentary

10 See, e.g., *First Past the Post*, ELECTORAL REFORM, <https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/first-past-the-post/> (last visited Apr. 10, 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, and third parties find it difficult to win elections).

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

12 *Id.* at 13.

system. In a parliamentary system, the head of the winning legislative party becomes Prime Minister, and the party immediately gains control of both the executive and legislative branches. There is no strict separation of powers, and there are fewer checks and balances. The new majority party can do pretty much what it wants (as long as its coalition partners go along), and the minority party is effectively shut out of governance for a time. That means that there are many small revolutions instead of a few big ones.

In American politics, by contrast, once a party becomes dominant and a new regime begins, the party tends to shape political agendas—and constrict opportunities for alternative policy agendas—even when the opposition party temporarily gains the White House or has a powerbase in particular states. For example, between 1860 and 1932, the Republican Party controlled the presidency most of the time, even though the South was usually controlled by the Democrats, and Democrats won control of one house of Congress from time to time.¹³

There have been about six of these regimes in American history, each featuring a dominant party. In each cycle a new dominant party rises, forms a winning coalition, dominates political agendas, and then slowly decays and falls apart, often the victim of its own success:

13 *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Apr. 5, 2021); *Party Division of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Apr. 5, 2021); *Presidents*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/> (last visited Apr. 5, 2021); *Party Divisions of United States Congresses*, WIKIPEDIA, https://en.wikipedia.org/wiki/Party_divisions_of_United_States_Congresses (last updated Jan. 29, 2021).

TABLE 1: REGIMES IN AMERICAN POLITICAL HISTORY, 1789–2020¹⁴
(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) ¹⁵
New Deal / Civil Rights	1933–1981	Democrats (32)	Republicans (16)
Reagan (Second Republican)	1981–?	Republicans (24)	Democrats (16)

An easy way to see how dominant parties shape the political possibilities within each regime is to compare the last two regimes.¹⁶ The regime that was in place when I was born was the New Deal/Civil Rights regime, which lasted from 1933, when Franklin Roosevelt was elected, until 1981, when Ronald Reagan became President. The Democratic Party was the dominant party in this regime, but politics was relatively depolarized. There were liberals and conservatives in both parties. This was a period with strong labor unions and higher taxes on the wealthy. This regime built out the administrative and welfare state. Political liberalism was in the ascendant, and government grew in size. This regime also produced the Social Security Act, the Fair Labor Standards Act, Medicare, the Environmental Protection Act, and the great Civil Rights Acts.

Eventually, this regime fell apart. In fact, it 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. The dominant party in the New Deal/Civil Rights regime, the Democratic Party, was an unwieldy coalition of Northerners who were relatively liberal on racial issues and Southerners who sought to defend Jim Crow. That alliance was repeatedly shaken as the country faced recurrent debates over civil

14 BALKIN, CYCLES, *supra* note 1, at 15. 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.

15 I count Andrew Johnson as a Democratic president, even though he ran as Lincoln's running mate in 1864 as part of a national unity ticket.

16 The next four paragraphs are adapted from Jack M. Balkin, *The Reagan Era Never Really Ended. A Trump Loss Could Change That.*, WASH. POST (Nov. 3, 2020), <https://www.washingtonpost.com/outlook/2020/11/03/reagan-trump-political-regimes-biden-cycles/>.

rights and civil liberties, especially in the years following *Brown v. Board of Education*.¹⁷ The coalition was further shaken by the upheavals of the 1960s and by the stagnation of the 1970s.

The New Deal/Civil Rights regime eventually gave way to the Reagan regime that began in the 1980s. Since then, the Republican Party and the conservative movement have set the tone for American politics. This is the era of neoliberalism, deregulation, weak labor unions, decreasing investment in public institutions, increasing wealth inequality, and mounting political polarization. Even the two Democrats elected in the Reagan Regime, Bill Clinton and Barack Obama, had to bob, weave, triangulate, and make concessions to the conservative politics of the era. (This is, in fact, the usual problem for presidents of the opposition party in a given regime.)¹⁸

After many years of success, the Reagan regime is running out of gas. The conservative coalition that has kept Republicans dominant for decades has begun to fray. The wealthy donors who bankroll the party's policies of upward redistribution of wealth and downward redistribution of risk are increasingly out of touch with the concerns of rural, working-class, and non-college-educated voters who constitute the mass of the party. Increasingly, only cultural warfare and distrust of liberal institutions have kept the GOP together, and it is having difficulty attracting younger voters. The party's ideology of privatization, deregulation, and ever lower taxes; its attacks on public programs; and its complacency about wealth inequality appeared increasingly tone-deaf even before the country faced both a pandemic and a recession. In its weakened state, the GOP has been captured by a cartoonish demagogue, Donald Trump, who cares more about stoking hatreds and lining his own pockets than attending to the public good.

The Republican coalition faces another problem—generational replacement.¹⁹ Regimes eventually crumble not only because people leave the dominant party but because new generations decide not to join up. By the end of the 2010s, the Republican Party's brand was increasingly toxic among the newly entering cohort of voters. These voters are not yet a large share of the voting population—young voters tend to vote less reliably than older ones—but the problem of generational replacement is on the horizon.

17 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); BALKIN, CYCLES, *supra* note 1, at 89–90.

18 See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 43–45, 449–51 (1997) (describing preemptive presidents); STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL* 103–13 (2d ed. 2011) (same).

19 BALKIN, CYCLES, *supra* note 1, at 164; see also Sam Wang, *An Early Look at 2024*, PRINCETON ELECTION CONSORTIUM (Nov. 2, 2016), <https://election.princeton.edu/2016/11/02/demographics/> (describing long term voting trends).

Although the party retains a strong base of older voters, an increasing number of young people are turned off by the perception that the party is intolerant, corrupt, and anti-science, and that its policies are skewed to the wealthy and out of touch with contemporary needs. This makes it very difficult for a regime to remain dominant over time.

The Republican Party's problem of generational replacement is only compounded by the fact that newer generations are increasingly non-white, while the Republican base is overwhelmingly white. The Party's central challenge is to find ways to increase its share of Black, Latino, and Asian voters. Fortunately for the Republicans, in 2020, Donald Trump was able to increase his share of the non-white vote by about five percentage points (to 26%) from 2016,²⁰ but the party will need to do considerably better as time goes on.

The Republican Party has lost the popular vote for the presidency in seven of the last eight elections and has only been able to gain the White House through winning the Electoral College in 2000 and 2016. Increasingly finding itself speaking only for a minority of Americans, the party has resorted to stocking the federal judiciary with as many life-tenured judges as possible and using every possible trick and mechanism to limit the franchise, delegitimize its political opponents, and remain in power.

Taken together, these problems for the Republican regime create an opportunity—but by no means a certainty—that a new coalition led by a new party will arise to shape American politics for a generation or more.

If the Reagan regime finally does give way, the most likely successor will feature the Democrats as the dominant party.²¹ The new majority coalition will be the natural evolution of the Obama coalition of minorities, women, college-educated professionals, city-dwellers, and suburbanites.²²

20 Chris Alcantara et al., *How Independents, Latino Voters and Catholics Shifted from 2016 and Swung States for Biden and Trump*, WASH. POST (Nov. 12, 2020), <https://www.washingtonpost.com/graphics/2020/elections/exit-polls-changes-2016-2020/> (noting that Trump's share of the non-white vote improved from 21% in 2016 to 26% in 2020); Avik Roy, *No, Trump Didn't Win 'The Largest Share of Non-White Voters of Any Republican in 60 Years'*, FORBES (Nov. 9, 2020), <https://www.forbes.com/sites/theapothecary/2020/11/09/no-trump-didnt-win-the-largest-share-of-non-white-voters-of-any-republican-in-60-years> (noting that Trump improved from an 8% to a 12% share of the votes of Black voters, a 29% share to a 32% share of Latino voters, and a 29% to a 31% share of Asian voters).

21 BALKIN, CYCLES, *supra* note 1, at 29.

22 Ronald Brownstein, *Kamala Harris's Nomination Is a Turning Point for Democrats*, ATLANTIC (Aug. 12, 2020), <https://www.theatlantic.com/politics/archive/2020/08/kamala-harris-and-new-democratic-party-coalition/615187/> ("Harris embodies the Democratic Party of the 21st century: a biracial child of immigrants (who is herself in an interracial marriage) who rose to political prominence from a base in San Francisco,

This coalition will have a different ideology and a different set of interests. It will have a different policy agenda than the conservative movement did, and it will likely reject significant parts of the older neo-liberal regime. Just as the Reagan regime took politics in a different direction than the New Deal/Civil Rights regime that preceded it, so will the next regime.

The COVID-19 pandemic, and the economic contraction that accompanied it, have handed the Democrats an opportunity. But despite Joe Biden's victory in the 2020 election, it is premature to conclude that the Reagan regime is finally over.

First, Biden's margin of victory—approximately four percent—was substantial but not overwhelming.²³ Perhaps more importantly, Biden did not have coattails. The Democrats lost seats in the House of Representatives, maintaining only a slim majority. They underperformed expectations in the Senate, finally achieving a 50-50 tie following the January runoff in Georgia. They will face determined Republican opposition in the Senate, and they must overcome filibuster rules that require sixty votes for most kinds of legislation. If Democrats do not alter these rules, many of their most ambitious plans for policy change may have to be put on hold—Democrats may find it difficult to pass a new voting rights act or admit new states to the Union to deal with the Senate's malapportionment, for example. Unless they can fit their reforms within reconciliation rules that allow passage by a simple majority, they will be constrained in passing new legislation or fixing existing programs.²⁴ For example, Democrats were able to push through a major piece of social welfare legislation, the American Rescue Plan Act of 2021, with only Democratic votes in the Senate.²⁵ But they had to omit a provision that would have raised the federal minimum wage because the Senate Parliamentary ruled that it did not fit within the reconciliation rules.²⁶

a diverse, globalized hub of the emerging information economy.”); Ronald Brownstein, *The Hidden History of the American Electorate (II)*, NAT'L J. (Aug. 24, 2012), <https://www.yahoo.com/news/hidden-history-american-electorate-ii-175214333.html> [https://perma.cc/M5JN-YMCP] (describing Obama's “coalition of the ascendant”).

23 See David Wasserman et al., *National Popular Vote Tracker*, COOK POL. REP., <https://cookpolitical.com/2020-national-popular-vote-tracker> (last visited Dec. 1, 2020).

24 See Richard Kogan & David Reich, *Introduction to Budget “Reconciliation,”* CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 21, 2021), <https://www.cbpp.org/research/federal-budget/introduction-to-budget-reconciliation> (explaining the reconciliation rules).

25 American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4; Chloe Weiner & Barbara Sprunt, *House Gives Final Approval to \$1.9 Trillion COVID-19 Relief Package*, NPR (Mar. 10, 2021), <https://www.npr.org/2021/03/10/975030323/house-gives-final-approval-to-1-9-trillion-covid-19-relief-package>.

26 Kelsey Snell, *Senate Can't Vote on \$15 Minimum Wage, Parliamentary Rules*, NPR (Feb. 25, 2021), <https://www.npr.org/2021/02/25/970637190/senate-cant-vote-on-15->

Because Democrats will often need complete unanimity in their Senate caucus plus the Vice President's tie-breaking vote, they will be unable to make executive appointments that are very far to the left, and they may struggle to confirm new judges and Justices. The convention of using the Senate's filibuster rules to require sixty votes for most kinds of legislation is the product of the past twenty-five years.²⁷ It reflects the deepening polarization of politics characteristic of the Reagan regime. It also meshed well with the reigning ideology of the Reagan regime, which cast doubt on the ability of the federal government to solve the country's problems. Regular use of the filibuster, which prevented or hobbled many government reforms, allowed anti-government conservatives to claim that they had been right all along.

A new regime led by Democrats will require flexible and responsive government to meet current crises and promote the party's policies. Thus, although the political impact of the filibuster on the two parties changes over time, under current circumstances, the filibuster harms the policy goals and political success of Democrats far more than Republicans.²⁸ Therefore, one important sign that the Reagan regime has ended would be significant reform or elimination of the filibuster. Until that happens, Democrats will find it difficult to remake American politics.

A second reason why we cannot yet conclude that the Reagan regime is finally over is that it takes successive electoral victories to consolidate a new regime. The Democrats cannot achieve this goal unless they succeed in dealing with the immediate problems of the pandemic, economic contraction, and unemployment, not to mention the looming threats brought on by climate change.

That success is not guaranteed. Republicans in Congress are unlikely to be very cooperative, especially because they learned from the Obama years that intransigence could be good politics.²⁹ (That is another reason why Democrats will experience mounting pressure for filibuster reform.)

minimum-wage-parliamentarian-rules.

27 Molly E. Reynolds, *What Is the Senate Filibuster, and What Would It Take to Eliminate It?*, BROOKINGS: POL'Y 2020 (Sept. 9, 2020), <https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/>.

28 See Matthew Yglesias, *The Democratic Debate over Filibuster Reform, Explained*, VOX (Apr. 5, 2019), <https://www.vox.com/2019/3/5/18241447/filibuster-reform-explained-warren-booker-sanders> (arguing that, on balance, progressives benefit from eliminating the filibuster because “[i]t’s very hard to create big new programs, but once they’re in place, they are hard to take away.”).

29 Michael Grunwald, *The Victory of ‘No,’ POLITICO* (Dec. 4, 2016), <https://www.politico.com/magazine/story/2016/12/republican-party-obstructionism-victory-trump-214498> (“The GOP’s unprecedented anti-Obama obstructionism was a remarkable success.”).

Democrats also face a federal judiciary stocked with many new conservative Trump appointees and a 6-3 conservative majority on the Supreme Court. They must also contend with powerful conservative media organizations that have shown few scruples about engaging in propaganda and conspiracy theories.³⁰ The Capitol Hill insurrection of January 6, 2021, showed the power of propaganda in shaping American politics. Conspiracy theories alleging that the 2020 election was stolen—designed to de-legitimize the incoming Biden Administration—may persist for years.³¹ Equally troubling, many Republican politicians have shown that they are willing to play along with conspiracy theories for political gain, further adding to the political hurdles that Democrats will have to overcome.³²

If the Democrats stumble, and the pandemic gets worse and the economy sags, they will be punished in succeeding elections. The Reagan regime, which once seemed on the brink of exhaustion, may get a second wind. It will likely move forward on Trumpist terms—a strange brew of white grievance politics, conservative Christianity, bare-knuckled capitalism, deepening corruption, and authoritarian politics.³³

Thus, the meaning of the 2020 election for the cycle of regimes is inconclusive. The Reagan regime seems to be nearing its end. But the 2020 elections showed that there is still life in it. Over seventy-four million people

30 Yochai Benkler et al., *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* 75–79 (2018) [hereinafter Benkler et al., *Network Propaganda*] (arguing that conservative media have created a propaganda feedback loop that amplifies and encourages disinformation and conspiracy theories); Yochai Benkler et al., *Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda*, *COLUM. JOURNALISM REV.*, (Mar. 3, 2017) [hereinafter Benkler et al., *Study*], <https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php> (showing the emergence of a distinctive right-wing media disinformation system); Kathleen Hall Jamieson & Dolores Albarracín, *The Relation Between Media Consumption and Misinformation at the Outset of the SARS-CoV-2 Pandemic in the US*, *HARV. KENNEDY SCH. MISINFORMATION REV.* (Apr. 2020), https://misinforeview.hks.harvard.edu/wp-content/uploads/2020/04/April19_FORMATTED_COVID-19-Survey.pdf (finding that “conservative media use (e.g., Fox News) correlated with conspiracy theories including believing that some in the CDC were exaggerating the seriousness of the virus to undermine the presidency of Donald Trump”); Jane Mayer, *The Making of the Fox News White House*, *NEW YORKER* (Mar. 4, 2019), <https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house> [<https://perma.cc/S2XM-772U>] (describing how Fox News became a propaganda arm of the Trump Administration).

31 Kaleigh Rogers, *The Birther Myth Stuck Around for Years. The Election Fraud Myth Might Too.*, *FIVETHIRTYEIGHT* (Nov. 23, 2020), <https://fivethirtyeight.com/features/the-birther-myth-stuck-around-for-years-the-election-fraud-myth-might-too/>.

32 See Sprunt, *supra* note 8.

33 BALKIN, *CYCLES*, *supra* note 1, at 27.

voted for four more years of Donald Trump³⁴—despite a pandemic that had already taken hundreds of thousands of American lives; and despite overwhelming evidence of President Trump’s venality, corruption, and incompetence. Even if we interpret Trump’s loss as a repudiation of Trump personally, Republican gains in the House suggest that the election was not a repudiation of the party as a whole. Moreover, the success of Trump’s propaganda meant that a large number of Republicans believe the election was stolen and that Trump actually won.³⁵

The old regime is dying, but a new one has yet to be born. Instead, we appear to be continuing a period of intense competition between the two major political parties.³⁶ In American history, such periods of nearly equal party strength tend to be especially bitter and feature deep mutual enmity and hardball tactics. In this respect, our situation is very similar to the Gilded Age in the last decades of the nineteenth century. In fact, we should call that period the First Gilded Age because we are now in our Second Gilded Age. I will say more about this in a moment.

34 Wasserman et al., *supra* note 23.

35 See *Voters’ Reflections on the 2020 Election*, PEW RSCH. CTR. (Jan. 15, 2021), <https://www.pewresearch.org/politics/2021/01/15/voters-reflections-on-the-2020-election/> (finding that approximately three quarters of Trump voters incorrectly believe that he won the 2020 election).

36 See Sam Wang, *Electoral Math and the New Gilded Age*, BALKINIZATION (Sept. 24, 2020), <https://balkin.blogspot.com/2020/09/electoral-math-and-new-gilded-age.html> (comparing the closeness of presidential elections in the Gilded Age and today).

II. POLARIZATION AND DEPOLARIZATION

The years of transition between political regimes tend to be very confusing. Politics seems to be broken, and government seems to be ineffectual. For example, at the end of the 1970s, during the Carter Administration, people wondered whether the United States was even governable and whether the presidency was too big a job for one person.³⁷ After Reagan's landslide reelection in 1984, people stopped talking this way. A new regime had been born. Democrats and liberals may not have liked what Reagan was doing, but the confusion that occurs between regimes had all but dissipated.

But that transition—from the New Deal/Civil Rights regime to the Reagan Regime—was nowhere near as difficult as this one is going to be. The reason concerns the second of the cycles of constitutional time—the cycle of polarization.

Today we live in a strongly polarized political environment. Political tribalism has made cooperation between the parties very difficult, and each side distrusts the other. Propaganda and misinformation, especially by conservative media, only amplify this distrust.³⁸ But the kind of highly polarized politics that seems normal to us now hasn't always existed. In fact, there has been a very long cycle of polarization, de-polarization, and re-polarization stretching over about 150 years of American history and across several different political regimes.³⁹

Like the cycle of regimes, political polarization in the United States is also shaped by the organization of the party system.⁴⁰ Our modern party system took many years to develop. The North and South were increasingly at odds from the Missouri Compromise to the Civil War, and several different parties sprang up and went out of business, including the National Republican (or Anti-Jackson) Party, the Whigs, the Know-Nothing Party, and

37 Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1160–61 (2014).

38 Marc Hetherington & Jonathan M. Ladd, *Destroying Trust in the Media, Science, and Government Has Left America Vulnerable to Disaster*, BROOKINGS (May 1, 2020), <https://www.brookings.edu/blog/fixgov/2020/05/01/destroying-trust-in-the-media-science-and-government-has-left-america-vulnerable-to-disaster/>.

39 Lee Drutman, *American Politics Has Reached Peak Polarization*, VOX (Mar. 24, 2016), <https://www.vox.com/polyarchy/2016/3/24/11298808/american-politics-peakpolarization> [<https://perma.cc/RDL4-XM9B>]; Jeff Lewis, *Polarization in Congress*, UCLA DEP'T OF POL. SCI.: VOTEVIEW.COM (Mar. 11, 2018), https://www.voteview.com/articles/party_polarization [<https://perma.cc/5VZB-DUJA>] (graph of “Liberal-conservative partisan polarization by chamber”).

40 BALKIN, CYCLES, *supra* note 1, at 30–31.

the Free Soil Party. A party system featuring two major parties—Democrats and Republicans—dates from just before the Civil War.

Not surprisingly, the Democrats—the party of the South—and the Republicans—the party of the North, founded in 1854—didn't like each other very much. After the Civil War, the enmity between the two parties and between their bases in the South and North, respectively, continued from the end of Reconstruction through the First Gilded Age and well into the 1890s.

Party polarization reached its peak right around the turn of the twentieth century. Over the next several decades, American politics began to depolarize rapidly.⁴¹ Political polarization bottomed out sometime in the 1930s, at the beginning of the New Deal/Civil Rights regime.⁴²

In fact, one of the characteristic features of the New Deal/Civil Rights regime is depolarization. It was a politics very unlike our own. There were liberal, moderate, and conservative Democrats, and there were liberal, moderate, and conservative Republicans. Members of the two parties often got along and often crossed party lines on particular subjects. Major legislation often passed with bipartisan coalitions. For example, the great Civil Rights Acts—the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968—were bipartisan projects of liberal Democrats and moderate to liberal Republicans. During the Nixon Administration, when the Republicans controlled the White House and the Democrats controlled Congress,⁴³ the federal government enacted many important pieces of legislation, including the National Environmental Policy Act of 1969,⁴⁴ the Equal Employment Opportunity Act of 1972,⁴⁵ and two extensions to the Voting Rights Act in 1970 and 1975.⁴⁶

The New Deal/Civil Rights regime had so much bipartisan legislation because each party's coalition was ideologically incoherent judged by today's standards. The Democrats were a coalition of Northern

41 *Id.* at 30; Lewis, *supra* note 39.

42 Lewis, *supra* note 39.

43 *See* sources cited, *supra* note 13 (noting Democratic control of Congress during the Nixon Administration).

44 National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347).

45 Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 U.S.C. and 42 U.S.C.) (amending the Civil Rights Act of 1964).

46 1975 Amendments to the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 52 U.S.C. §§ 10301–10314); Voting Rights Act of 1965 Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 52 U.S.C. §§ 10301–10314).

liberals and Southern conservatives who agreed on class issues and economic regulation but were intensely divided over issues of culture and race. The Republicans were also an incoherent coalition; tending as a whole to be conservative on economic issues while divided on social issues.⁴⁷ The power of the Southern bloc in the Democratic Party meant that African-Americans were left out of many programs during the New Deal,⁴⁸ and civil rights legislation was impossible until the Southern filibuster on civil rights legislation was finally broken in the 1960s.

After the Voting Rights Act of 1965, American politics began to change rapidly, and by the 1970s, the country entered what we now call the “culture wars.”⁴⁹ The New Deal coalition began to fracture. A demagogue, Alabama governor George Wallace, split the Democratic vote in 1968 and was well on his way to doing so again in 1972 before he was shot.⁵⁰

After Wallace, Republican politicians and the conservative activists who formed the New Right learned how to use wedge issues of culture and race to successfully break apart the old New Deal/Democratic coalition.⁵¹ They started to form a new coalition that included many white ethnics, Catholics, and evangelical Christians. This eventually became the Reagan coalition that won the White House for three consecutive terms in 1980, 1984, and 1988.

Although the Republicans controlled the presidency from 1980 to 1992, they did not have control of both houses of Congress. Congressman (and later House Speaker) Newt Gingrich figured out that polarization would be an effective strategy for making Republicans a majority party that could also gain control of Congress. He encouraged his fellow Republicans

47 See BALKIN, *CYCLES*, *supra* note 1, at 16, 30–31; BYRON E. SHAFER, *THE AMERICAN POLITICAL PATTERN: STABILITY AND CHANGE, 1932–2016*, at 134 (2016). One could further divide Republicans into Regular Republicans and Northeastern Republicans. SHAFER, *supra*, at 34–35.

48 IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 17–18* (2013); IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 29 (2005).

49 See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 287–97 (2011) (arguing that the Voting Rights Act of 1965, which broke the South’s one-party monopoly, is an important cause of polarization).

50 The standard account of Wallace’s political career is DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (2d ed. 2000).

51 See 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).

to engage in blistering rhetorical warfare, labeling Democrats as diseased, immoral, sick, and un-American.⁵² Gingrich and his Republican allies sought out wedge issues involving race, religion, and sexuality to fracture formerly Democratic majorities; they played culture wars issues for all they were worth.⁵³

Polarization in the modern era has been asymmetrical: over time, Democrats have moved a little to the left, mostly because conservative Southerners left the party, but Republicans moved considerably to the right.⁵⁴ Put another way, America began with a center-left and a center-right party in the 1970s and ended up with a center-left party and a very conservative party by the 2000s.⁵⁵ This had the effect of shifting the country's political

52 JULIAN E. ZELIZER, *BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY* 4 (2020) (arguing that Gingrich developed a form of “smashmouth” politics designed to delegitimize the political opposition and sow distrust in institutions); SAM ROSENFELD, *THE POLARIZERS: POSTWAR ARCHITECTS OF OUR PARTISAN ERA* 268 (2017) (arguing that Gingrich “led the way” in developing the GOP’s “highly disciplined and confrontational political strategy that would take partisan combat in both chambers to new heights.”); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 146–51 (2018) (describing Gingrich’s strategy of demonizing his political rivals); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 35–39 (2012) (same); McKay Coppins, *The Man Who Broke Politics*, ATLANTIC (Oct. 17, 2018), <https://www.theatlantic.com/magazine/archive/2018/11/newt-gingrich-says-youre-welcome/570832/> [<https://perma.cc/WG2Y-Y6BA>] (“[F]ew figures in modern history have done more than Gingrich to lay the groundwork for Trump’s rise. During his two decades in Congress, he pioneered a style of partisan combat—replete with name-calling, conspiracy theories, and strategic obstructionism—that poisoned America’s political culture and plunged Washington into permanent dysfunction.”).

53 See MANN & ORNSTEIN, *supra* note 52, at 44 (describing consequences of Republican strategies of polarization). For a recent mea culpa by a Republican strategist detailing the deliberate use of race and racial grievance as wedge issues, see STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* (2020).

54 MANN & ORNSTEIN, *supra* note 52, at 51–58 (describing asymmetric polarization); Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in AM. POLITICAL SCI. ASS’N, *NEGOTIATING AGREEMENT IN POLITICS* 19–26 (Jane Mansbridge & Cathie Jo Martin eds., 2013) (reviewing evidence of asymmetric polarization).

55 Sahil Chinoy, *What Happened to America’s Political Center of Gravity?*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/interactive/2019/06/26/opinion/sunday/republican-platform-far-right.html> (explaining that “[t]he Republican Party leans much farther right than most traditional conservative parties in Western Europe and Canada,” while “[t]he Democratic Party, in contrast, is positioned closer to mainstream liberal parties”); Anna Lührmann et al., *New Global Data on Political Parties: V-Party*, V-DEM INSTITUTE (Oct. 26, 2020), https://www.v-dem.net/media/filer_public/b6/55/b6553f85-5c5d-45ec-be63-a48a2abe3f62/briefing_paper_9.pdf (“[T]he Republican party in the US has retreated from upholding democratic norms in recent years. Its rhetoric is closer to authoritarian parties, such as AKP in Turkey and

center of gravity to the right.

Gingrich and other Republican operatives found that focusing on issues of identity and stoking the culture wars was the best way to break apart the New Deal coalition and make Republicans a majority party. The rise of conservative media also helped. The Federal Communication Commission's repeal of the Fairness Doctrine in 1987 made conservative talk radio possible.⁵⁶ Cable television allowed companies to appeal to niche audiences rather than broad segments of the public, and Fox News began its cable operations in 1996.⁵⁷

Conservative media encouraged polarization and stoked cultural resentments and thereby promoted the Republican cause.⁵⁸ The role of pre-digital media—radio and cable—is important to the story because many people assume that the internet is the central cause of political polarization. In fact, social media built on the country's existing asymmetrical polarization and on an existing pre-digital media ecology that had long been encouraging asymmetrical polarization.⁵⁹

Even if Republicans eventually lost many culture war issues, the culture war itself proved wildly successful from the standpoint of electoral politics. Former Democrats in the South joined the Republican Party, and a whole generation of new voters tilted to the right. Eventually, the Republican Party, originally a party of educated professionals and business people centered in the North and West, was transformed into a white person's party centered in the Sunbelt and especially the South.⁶⁰ Politically speaking, this turned out to be a good exchange, and it made the Republican Party the dominant party for many years. But the culture wars had the side effect of stoking polarization, which increased steadily during the 1970s and 1980s

Fidesz in Hungary. Conversely, the Democratic party has retained a commitment to longstanding democratic standards.”); *The Republican Party Has Lurched Towards Populism and Illiberalism*, ECONOMIST (Oct. 31, 2020), <https://www.economist.com/graphic-detail/2020/10/31/the-republican-party-has-lurched-towards-populism-and-illiberalism>; Ivana Kottasová, *US Republicans Are Starting to Look a Lot Like Authoritarian Parties in Hungary and Turkey, Study Finds*, CNN (Oct. 26, 2020), <https://edition.cnn.com/2020/10/26/world/republican-party-more-illiberal-study-intl/index.html>.

56 BENKLER ET AL., NETWORK PROPAGANDA, *supra* note 30, at 321; NICOLE HEMMER, MESSENGERS OF THE RIGHT: CONSERVATIVE MEDIA AND THE TRANSFORMATION OF AMERICAN POLITICS 261 (2016).

57 BENKLER ET AL., NETWORK PROPAGANDA, *supra* note 30, at 319.

58 BENKLER ET AL., NETWORK PROPAGANDA, *supra* note 30; HEMMER, *supra* note 56, at 271–76; BRIAN ROSENWALD, TALK RADIO'S AMERICA: HOW AN INDUSTRY TOOK OVER A POLITICAL PARTY THAT TOOK OVER THE UNITED STATES (2019); Mayer, *supra* note 30.

59 BENKLER ET AL., NETWORK PROPAGANDA, *supra* note 30, at 311–12; Benkler et al., *Study*, *supra* note 30.

60 See BALKIN, CYCLES, *supra* note 1, at 172.

and really took off during the 1990s.⁶¹ By Obama's election in 2008, the country had reached levels of polarization similar to those during the Civil War and the First Gilded Age.⁶² Things have only gotten worse since then.

61 Lewis, *supra* note 39.

62 *Id.*

III. CONSTITUTIONAL ROT

This brings me to the third of the cycles I describe in my book—the cycle of constitutional rot and renewal.

The idea of the decline and renewal of political regimes is one of the oldest ideas in political theory. The Greek historian Polybius offered a famous version of this claim in Book VI of his *Histories*, and even before him, different versions of the idea appear in Plato and Aristotle.⁶³ Polybius argued that political regimes don't last forever, and eventually, they decay and turn into new forms. He wrote about cycling between different types of government, such as monarchies, aristocracies, and democracies.⁶⁴ But the idea that regimes rise and fall especially influenced people thinking about the health and survival of republics.⁶⁵

Because they rely on norms of cooperation, devotion to the public good, and civic virtue, republics are delicate things, easily corrupted, and always subject to decay. The Framers of the Constitution, who had read the ancient authors, understood this problem well. They knew that every republic before them had fallen into mob rule, civil war, oligarchy, or tyranny. They tried to design a constitution that would make republican government last as long as possible.⁶⁶ To a significant extent, their design—and the work of those who followed them—has been successful. We still have a republic 230 years later, despite many periods of political and social upheaval, including a civil war. But, of course, we don't know how the story ends. Perhaps the ancients will be proved right after all.

American history has featured episodes of what I call “constitutional rot,” which are followed by periods of constitutional renewal. Constitutional rot is a feature of republican governments. It is the process by which a constitutional republic becomes less democratic and less republican over time.⁶⁷ By less democratic, I mean less responsive to popular will. By less republican, I mean that public officials and citizens become less focused on the pursuit of the public good. Instead, politicians become more interested in promoting their own self-interest or protecting the interests of a small

63 3 POLYBIUS, *THE HISTORIES* bk. VI, at 372–79 (Robin Waterfield trans., Oxford University Press 2010); 2 PLATO, *THE REPUBLIC* bk. VIII, at 234–333 (T.E. Page et al. eds., Paul Shorey trans., Harvard Univ. Press 1935); ARISTOTLE, *POLITICS* bk. V, at 209–57 (Benjamin Jowett trans., Random House 1943).

64 POLYBIUS, *supra* note 63, at 372–79.

65 *See generally* J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 77, 189, 401, 526, 539, 545, 548 (2d ed. 2003).

66 BALKIN, *CYCLES*, *supra* note 1, at 47–48.

67 *Id.* at 45.

group of powerful and wealthy individuals and groups who keep them in power. When this happens, constitutional rot leads to oligarchy or to authoritarianism, even if the outward forms of republican government are preserved.

The theory of republicanism—from Machiavelli to Montesquieu and the Founders—often emphasizes the importance of civic virtue as necessary to maintain republican government.⁶⁸ Thus, one might say that constitutional rot is the gradual loss of civic virtue and public-spiritedness in the country's leaders and in the public as a whole. Civic virtue, in turn, is connected to the virtues of trust, cooperation, and willingness to set aside partisan enmity in the service of making republican government work over time. Thus, when civic virtue decays, the public loses trust in its leaders—and in political and civic institutions generally. The leaders of different parties lose trust in each other. Each side stops cooperating with each other and working for a common good. Instead, each tries to dominate the other before the other has a chance to dominate them.

Political struggles are always struggles for power and over who gets to rule. But there is a difference between how people struggle for power in healthy republics and how they struggle for power in periods of constitutional rot. In healthy republics, politics is a struggle for power that is premised on—and that depends on—republican norms and practices. These norms and practices combine political contest with deeper forms of political cooperation. They are designed to keep the enterprise of republican government functioning even as the parties contend in politics. They operate for the purpose of reproducing the system of representative government and promoting the common good, including the common good of democratic politics. Thus, in healthy republics, the everyday struggle of different interest groups and parties—each of which pursues different values and goals and asserts its own version of the public interest—rests on a deeper set of republican values and republican conventions. Liberal pluralists are correct that the question of what is in the public interest is always contested and never finally settled. That contest drives politics forward. But in healthy republics, that perpetual contest over what is really in the public interest rests on something deeper: a shared commitment to fight over the nature of the public interest through republican institutions that the combatants promise

68 See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 105 (Vintage Books 1993) (1992) (“Precisely because republics required civic virtue and disinterestedness among their citizens, they were very fragile polities, extremely liable to corruption.”); see also PHILIP PETTI, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 20, 245 (1997) (noting that the republican tradition assumes that civic virtue is necessary to the health of republics).

to further and reproduce over time.

In periods of constitutional rot, by contrast, politics degenerates into the naked struggle for power, heedless of the long-term effects on the health of republican institutions. Cooperative norms decay. The republican substrate on which liberal pluralist combat sits slowly dissolves. Norms of fair play disintegrate.⁶⁹

Republicanism requires respect for majority rule and rotation in power when a party loses the support of the majority.⁷⁰ Thus, it requires fair elections that can measure and respond to majority will. But when constitutional rot sets in, parties are increasingly unwilling to accept democratic rotation in office. Party loyalists seeking to remain in power resort to whatever means are necessary to stay in power—even if this smashes previous norms and understandings—because they see the other side as an implacable enemy and do not trust their opponents with power.⁷¹ Thus, the incumbent party may try to restrict the vote to its likely supporters and to find other ways to entrench itself so that it is impervious to changes in the voting population. It will attempt to maintain a minoritarian government in the face of majority will. Leaders who accelerate constitutional rot do not only destroy cooperative norms and reject standards of political fair play. They also systematically attack the institutions that keep democracies democratic, including an independent judiciary, independent media, professional journalism, scientific institutions, universities, and the electoral system.⁷²

One must understand the idea of constitutional rot in context. The American Constitution has never been fully democratic. And it has never been fully republican. The American constitutional system has always been unrepresentative in important respects, and it has repeatedly either produced or ignored a series of great injustices and denials of liberty and equality. For the first eighty years of the country's history, slavery was permitted, and later

69 BALKIN, CYCLES, *supra* note 1, at 45–46. On the importance of norms to democracy, see LEVITSKY & ZIBLATT, *supra* note 52, at 102–17.

70 See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749, 757 (1994) (arguing that the central republican principle is majority rule); *id.* at 763 (quoting *The Federalist* No. 22 (Alexander Hamilton) for this proposition).

71 BALKIN, CYCLES, *supra* note 1, at 45–46.

72 *Id.* at 56–58; see LEVITSKY & ZIBLATT, *supra* note 52, at 177; Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, at 12–13, 16 (2020) (describing attacks on media, journalism, and universities as part of an authoritarian playbook.); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 133 (2018) (describing attacks on civil society institutions).

even celebrated by the dominant party in the United States—the Jacksonian Democrats. Even after slavery was abolished in 1865, all sorts of inequalities and injustices remained and troubled our country’s history. Women did not get the right to vote until 1920, and our modern conception of civil rights and civil liberties, imperfect as it is, is only a little more than half a century old. Thus, when we talk about episodes of backsliding from democracy and republicanism, we can only speak of this in relative terms. To speak of constitutional rot, then, means backsliding from a particular form of democratic politics, which was already deeply imperfect and unjust in many respects. We must always recognize that the redemption of our Constitution remains an unfinished project.

Four features of politics exacerbate rot. I call them the “Four Horsemen of constitutional rot.”⁷³ The first is increasing inequality of wealth. The second is increasing polarization. The third is loss of trust—in one’s fellow citizens, in politicians, in institutions generally, and between leaders of opposing parties. In times of rot, people increasingly regard the fellow inhabitants of their country as enemies who cannot be trusted with power, and therefore cannot be allowed to assume power.

A fourth factor in exacerbating rot is policy disasters that demonstrate the inability of politicians to govern the country and the fact that politicians do not care enough about the citizens to protect their interests.⁷⁴ Recent examples might include the response to Hurricane Katrina, the Iraq War, the 2008 financial crisis, or the Trump Administration’s response to COVID-19. These policy disasters also increase lack of trust in institutions and in politics generally.

In periods of constitutional rot, demagogues spring up.⁷⁵ They flatter the public, telling them that only the common people are wise and virtuous. They argue that ordinary people have been humiliated and undermined by unaccountable elites who scorn and look down on them, and who are not truly part of the people. Demagogues sow distrust and division in order to gain power. They attack institutions that produce trustworthy knowledge, and they disdain expertise. They identify scapegoats who, demagogues claim, are alien to the real people of the country and who are invading and undermining the country with the assistance of out-of-touch intellectuals and corrupt elites. Demagogues promise to restore the honor and status of the country’s forgotten people and defeat the sneering elites who view ordinary people with contempt. Versions of these demagogic strategies are always present in democracies, even in relatively healthy times. But in periods of

73 BALKIN, *CYCLES*, *supra* note 1, at 49–50.

74 *Id.*

75 *Id.* at 53–56.

advanced constitutional rot, they grow, fester, and dominate politics.

Another worrisome feature of rot is the rise of propaganda.⁷⁶ In its most general sense, propaganda is the propagation of false and misleading claims and images for political advantage. But I am interested in a narrower class of propaganda, which we might call “democracy-destroying” or “democracy-debilitating” propaganda. This form of propaganda is a strategy of rhetoric that undermines trust and sows division in democracies. The point of democracy-debilitating propaganda is to spread distrust in institutions and to make it difficult for people to know what is true and what is false. As a result, people indulge in conspiracy theories and believe people who they think are most like them, or people in their own political tribe. As with demagoguery, there are always forms of propaganda in republics, even healthy ones. But a high level of propaganda in a republic is an especially worrisome sign of constitutional rot because it accompanies and exacerbates loss of trust in institutions, in organizations that produce and disseminate knowledge, in fellow citizens, and in political leaders. Propaganda accelerates rot, and rot in turn makes politics especially susceptible to demagogues who flatter and mislead the public.

Today, all of the Four Horsemen of constitutional rot are on the march. We have wealth inequality not seen since the First Gilded Age, deep distrust of institutions, severe polarization, loss of mutual accommodation and cooperation between politicians of different parties, and a series of policy disasters. The United States now is flooded with the kinds of propaganda that were common in communist countries in the former Soviet Empire. The dominant party—the Republican Party—is doing everything it can to maintain its power. Donald Trump—the party’s nominal leader and its most recent president—has spread disinformation and sown distrust in science, news media, and the electoral system.⁷⁷ And to top it off, Trump is a racist demagogue who has encouraged other racists and demagogues to spring up and assert themselves.⁷⁸

76 *Id.* at 49, 60–61; see JASON STANLEY, HOW PROPAGANDA WORKS 93, 96, 108–09, 120–26 (2015) (explaining how propaganda erodes democratic norms and forms of reasoning necessary for democracy to function).

77 Hetherington & Ladd, *supra* note 38; Anne Applebaum, *Trump Is a Super-Spreader of Disinformation*, ATLANTIC (Oct. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/trump-super-spreader-disinformation/616604/>.

78 Fabiola Cineas, *Donald Trump Is the Accelerant; A Comprehensive Timeline of Trump Encouraging Hate Groups and Political Violence*, VOX (Jan. 9, 2021), <https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech>; Ayal Feinberg et al., *Counties that Hosted a 2016 Trump Rally Saw a 226 Percent Increase in Hate Crimes*, WASH. POST (Mar. 22, 2019), <https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/>.

Constitutional rot has been growing in the United States for the past forty years, but the Trump presidency greatly accelerated it. Trump treated the presidency as an opportunity to enrich himself and his family. He tried to use his powers as President to coerce a foreign government, Ukraine, into smearing his Democratic opponent in 2020.⁷⁹ Listing all of his contributions to constitutional rot in the United States would require a book in itself.⁸⁰ But his behavior following the 2020 election is a good example. Throughout the campaign, Trump had asserted that the election would be rigged against him and that voting by mail—the method he himself used to vote in previous elections⁸¹—was tainted by fraud.⁸² Rather than accept the basic proposition that those who lose elections should concede and prepare for a transition of power, Trump refused to concede that he could lose an election. Instead, he made baseless claims of widespread voting fraud.⁸³

Trump repeatedly sued in different states, trying to delay the certification of votes. While his lawyers were forced to backtrack from his false claims before courts, Trump and his supporters continued to lie shamelessly to the public.⁸⁴ In this way, he convinced many of his supporters that the electoral system was rigged and that the incoming president, Joe Biden, is illegitimate. Of course, Trump had risen to political prominence through a racist lie that his Democratic predecessor, Barack Obama, was born outside the United States and therefore was an illegitimate president.⁸⁵

The members of Trump's party, with few exceptions, did little to resist his assault on republican institutions. Although many of them secretly despise Trump, they are deeply afraid of the Republican base that has been fed lies and propaganda for years and now believes Trump's fantasies.⁸⁶ Until

79 BALKIN, *CYCLES*, *supra* note 1, at 58–61.

80 For a recent bill of particulars, see Klarman, *supra* note 72, at 19–45.

81 Miles Parks, *Trump, While Attacking Mail Voting, Casts Mail Ballot Again*, NPR (Aug. 19, 2020), <https://www.npr.org/2020/08/19/903886567/trump-while-attacking-mail-voting-casts-mail-ballot-again>; Marshall Cohen, *It's the Same Thing: Experts Baffled by Trump's Misleading Distinction Between 'Absentee' and 'Mail-in' Ballots*, CNN (Sept. 25, 2020), <https://www.cnn.com/2020/07/10/politics/fact-check-trump-absentee-versus-mail-ballots/index.html>.

82 See sources collected *supra*, in notes 5–6.

83 *Id.*

84 *Id.*

85 Michael Barbaro, *Donald Trump Clung to 'Birther' Lie for Years, and Still Isn't Apologetic*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/donald-trump-obama-birther.html> (“[I]t took Mr. Trump five years of dodging, winking and joking to surrender to reality, finally, on Friday, after a remarkable campaign of relentless deception that tried to undermine the legitimacy of the nation’s first black president.”).

86 Feinberg, *supra* note 6; Tim Alberta, *The Election That Broke the Republican Party*, POLITICO

the assault on the Capitol on January 6, 2021, most Republican leaders either remained silent, acted as spineless sycophants, or became voluble cheerleaders spouting propaganda. As Trump tried to salt the ground of American democracy, most of them stood by and did nothing, while others dabbled in conspiracy theories and egged him on.⁸⁷ Only the shock of the attack on Congress finally caused a significant number of Republicans to break with Trump, and yet even after the insurrection, he still retained wide support among party leaders.⁸⁸

So far in my analysis of the American constitutional system, I have said little about the Supreme Court, the lower federal courts, or constitutional doctrine. That omission is deliberate. The structures and cycles of party representation are far more important to understanding the health of our democracy than the details of constitutional doctrine.

Because of life tenure, courts are usually a lagging indicator of the cycles of constitutional time.⁸⁹ Turnover of personnel on the courts takes a fairly long time. That is especially so as judges live longer and politicians try to install younger judges on the bench. As a result, courts become polarized long after politics itself has become polarized, and they will continue to reflect that polarization for many years to come. In the same way, the judiciary will tend to experience and reflect the consequences of constitutional rot well after the country does.⁹⁰

Even in a period of constitutional rot like the present, we can still expect courts to defend against the most naked attempts at overreach. For example, following the 2020 election, President Trump's lawyers made a

(Nov. 6, 2020), <https://www.politico.com/news/magazine/2020/11/06/the-election-that-broke-the-republican-party-434797>.

87 Paul Kane et al., *Most Republicans Greet Trump's Push to Overturn the Election with a Customary Response: Silence*, WASH. POST (Nov. 20, 2020), https://www.washingtonpost.com/politics/most-republicans-greet-trumps-push-to-overturn-the-election-with-a-customary-response-silence/2020/11/20/91948292-2b52-11eb-9b14-ad872157ebc9_story.html; Nicholas Fandos, *Republicans in Congress Stay Largely in Line Behind Trump*, N.Y. TIMES (Nov. 20, 2020), <https://www.nytimes.com/2020/11/20/us/politics/republicans-congress-trump.html>; Alberta, *supra* note 86.

88 Josh Dawsey, *At Party Retreat Far from D.C. Turmoil, Republicans Still Sing Praises of Trump*, WASH. POST (Jan. 8, 2021), https://www.washingtonpost.com/politics/trump-rnc-amelia/2021/01/08/6cd0c730-51e6-11eb-b2e8-3339e73d9da2_story.html; Eli Yokley, *Trump's Popularity Declines Among GOP Voters After Brutal Week for the Country*, MORNING CONSULT (Jan. 8, 2021), <https://morningconsult.com/2021/01/08/trump-approval-rating-capitol-riot-poll/>; Eli Yokley, *Half of Voters Call for Cabinet to Remove Trump as Bulk of Republicans Say He Should Retain 'Major Role' in Party*, MORNING CONSULT (Jan. 7, 2021), <https://morningconsult.com/2021/01/07/capitol-riots-trump-blame-polling/>.

89 BALKIN, CYCLES, *supra* note 1, at 149.

90 *See id.*

series of implausible claims trying to prevent the certification of votes, and judges—including judges Trump himself had appointed—rejected them.⁹¹ But we should not rest our hopes for democratic renewal on the fact that courts will respond in the most extreme cases. We should not look to the courts as an effective counterweight to the decay of our institutions, much less a source of political leadership for constitutional renewal. Courts are generally not the solution to constitutional rot, and they may sometimes be part of the problem.⁹² Moreover, in periods of constitutional rot, the courts are a special prize of politics, and politicians engage in constitutional hardball to entrench their ideological allies in the courts.⁹³

We shouldn't give up on judicial review entirely—that would be throwing the baby out with the bathwater. But in times of high polarization and constitutional rot, courts are unlikely to be the heroes of the story. The Supreme Court in particular is unlikely to cover itself with glory during periods of high polarization and constitutional rot. Certainly the Justices did not do so in the 1840s and 1850s, when the Court defended the interests of the Slave Power, nor at the turn of the twentieth century, when the Court championed the ideology of Gilded Age capitalism. (The latter period is now known as the *Lochner* Era.) That should not be surprising. Courts are rarely much better or worse than the political environment they live in, and they tend to share many of the assumptions of the politicians who appointed them.⁹⁴

Law professors and law students are often conditioned to look to the Supreme Court as a bulwark of constitutional democracy. But the courts are not coming to save us from our constitutional troubles this time around. In periods of polarization and rot, they will not prove reliable sources of constitutional renewal, and judging by the history of previous episodes of constitutional rot, the Supreme Court in particular is far more likely to serve as an impediment to the repair of our democratic institutions.⁹⁵ If America is to deal with constitutional rot, it will have to be through repeated political mobilizations that change the terms of our politics, as happened in the first decades of the twentieth century.

91 See, e.g., *Donald J. Trump For President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 391 (3d Cir. 2020) (upholding a lower court dismissal of the Trump campaign's claims with prejudice); Peter Baker & Kathleen Gray, *In Key States, Republicans Were Critical in Resisting Trump's Election Narrative*, N.Y. TIMES (Nov. 28, 2020), <https://www.nytimes.com/2020/11/28/us/politics/trump-republicans-election-results.html> (noting that Trump appointed judges dismissed the President's legal claims).

92 BALKIN, *CYCLES*, *supra* note 1, at 136–46.

93 *Id.* at 134–35.

94 See *id.* at 146.

95 *Id.* at 136–46.

IV. THE SECOND GILDED AGE

Now let's put all three of these cycles together. We are in the last days of a debilitated regime—the Reagan regime. The Republican Party is slowly losing its political clout and is now fighting with every last ounce of strength to entrench itself in power and to prevent the creation of a new political regime with a different winning coalition. We are at the peak of a cycle of political polarization the likes of which we have not seen since the late nineteenth century. And we are suffering from an advanced case of constitutional rot.

It is no wonder that people despair for the future of American democracy.

The extended transition between regimes in and of itself is not the central problem, even though these periods are often confusing and anxiety-provoking. As I noted previously, the United States has been through changes in regimes before. The last two occurred in the 1930s and 1980s when American politics was relatively depolarized. The current situation is likely to be very different from those two and far more fraught and even dangerous. The next regime, if and when it emerges, will commence under very stressful conditions of strong polarization and advanced constitutional rot. The problems of polarization and rot are a deeper cause of today's confusion and political despair than the gradual decay of the Reagan Regime.

There is no exact analogy between the situation we are in right now and America's past. But there is one fairly close analogy—at least with respect to the problems of high polarization and deep constitutional rot. That analogy is to the end of the 1890s—the close of the Gilded Age, or what I will call the First Gilded Age, for, as noted earlier, I think that we are now in our Second Gilded Age. Let me describe what the First Gilded Age was like, and perhaps you will see a few similarities to our own time.⁹⁶

The First Gilded Age featured vast inequalities of wealth because rapid technological change had created huge fortunes and monopolies.⁹⁷ Huge waves of immigration destabilized American politics and led to a series of fights over identity and race and who was really American. Demagogues sprang up to stoke hatreds and fears. The Gilded Age was a period of social unrest, violence, riots, and assassinations. Politics in the First Gilded Age was

96 For general accounts of the Gilded Age and its politics, see RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–96* (2017); ROBERT W. CHERNY, *AMERICAN POLITICS IN THE GILDED AGE: 1868–900* (1997).

97 BALKIN, *CYCLES*, *supra* note 1, at 62–63.

thoroughly corrupt, and government was effectively for sale. Because the cost of producing newspapers has decreased due to technological innovation, there was intense competition among newspapers for audience attention. In order to increase circulation and fill up content, they resorted to made-up stories. This is the era that introduces the phrase “yellow journalism”—sensationalistic stories designed to play to readers’ emotions, and often with only a strained relationship to the truth.⁹⁸

Politics during the First Gilded Age was often mindless and demagogic. It was a period of intense competition between the two major political parties. It was so competitive, in fact, that twice—in 1876 and 1888—the electoral college winner lost the popular vote.⁹⁹ Because margins of victory were often razor-thin, the parties were at each other’s throats.

If you had lived during the First Gilded Age and you had looked around at the demagoguery, at the inanity of politics, at the polarization of attitudes, at the vast inequalities of wealth, and at the deep corruption of American politics, you might well have feared that American democracy would fail.

But that’s not what happened. The excesses of the First Gilded Age led to the political and constitutional reforms of the Progressive Era, which proved to be a period of great constitutional creativity, not only at the federal level, but also in the states. These movements for reform eventually led to the New Deal.

In my book, I describe how party coalitions changed after 1896, and how this transformation led to depolarization and political renewal.¹⁰⁰ One reason to think that our current level of polarization is not permanent is that—as in years past—political coalitions are always transforming through slow processes of generational change. As coalitions change, so too do the central issues that divide the major parties.

In the First Gilded Age, much like today, politics was highly

98 *Id.* at 63; see TED CURTIS SMYTHE, *THE GILDED AGE PRESS, 1865–1900*, at 182–97 (2003); DAVID R. SPENCER, *THE YELLOW JOURNALISM: THE PRESS AND AMERICA’S EMERGENCE AS A WORLD POWER* 95–121 (2007); Randall S. Sumpter, *Think Journalism’s a Tough Field Today? Try Being a Reporter in the Gilded Age*, CONVERSATION (Oct. 4, 2018), <http://theconversation.com/thinkjournalisms-a-tough-field-today-try-being-a-reporter-in-the-gilded-age-103420> [https://perma.cc/5HJQ-NABC] (“Fakes became so common that an article in an 1892 issue of *The Journalist* estimated that the majority of stories supplied to newspapers by local news bureaus and press associations were fiction.”). See generally RANDALL S. SUMPTER, *BEFORE JOURNALISM SCHOOLS: HOW GILDED AGE REPORTERS LEARNED THE RULES* (2018) (describing technological changes that undermined newspaper profits and led to cut-throat competition and sensationalism).

99 See Wang, *supra* note 36.

100 BALKIN, *CYCLES*, *supra* note 1, at 36–37, 166.

polarized, and the parties faced off against each other on issues of race, religion, culture, and identity. Issues of economics and class, which cross-cut party coalitions, were relegated to the background.¹⁰¹ As I explain in my book, within two generations, this arrangement flipped.¹⁰² New sets of issues came to the fore, especially those involving economics, labor, and class. Immigrants and their American-born children joined the political parties and reshaped political coalitions. As politics moved from zero-sum disputes about identity and status competition to different sets of issues, depolarization rapidly gathered steam. By 1932, the situation had almost completely changed from the 1890s. Now the parties faced off primarily on economic and class issues, while each party was internally divided on questions of identity, religion, culture, and race.¹⁰³

Something similar, I believe, may well happen in our own time. In the late twentieth century, Republicans dismantled the New Deal coalition by moving issues of identity—race, ethnicity, religion, gender, and sexuality—to the forefront of American politics, and successfully pushing issues of class and economic inequality into the background.¹⁰⁴ This was part and parcel of the successful strategy of polarization in the Reagan Regime. Republican politicians and their allies in conservative media were so successful at this, in fact, that by the 2010s, the two major parties faced off once again primarily over issues of identity, a sort of replay of 1896.

In the process, both parties have changed markedly from where they stood during the New Deal/Civil Rights regime.¹⁰⁵ The Democrats are no longer primarily a labor and working-class party with a strong base in the South. The Republicans are no longer a party of professionals and business interests centered in the North and the West. Instead, the Democrats have become a cosmopolitan party, strong in the cities, the suburbs, and along the coasts, supported both by working-class and business interests as well as by increasing numbers of minority voters. Meanwhile, Republicans have

101 CHERNY, *supra* note 96, at 29–31.

102 *Id.*; 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 (2016).

103 BALKIN, *CYCLES*, *supra* note 1, at 36–37, 166.

104 See STEVENS, *supra* note 53, at 31 (describing Republican strategists' and politicians' use of race); E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS: DEATH OF THE DEMOCRATIC PROCESS 12 (1991) (arguing that cultural issues allowed Republicans to split the New Deal coalition); THOMAS BYRNE EDSALL & 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, non-economic polarization of the electorate.”).

105 BALKIN, *CYCLES*, *supra* note 1, at 166–70.

become the dominant party in the Democrats' old stronghold—the South. They have gained a large number of white working-class and rural voters along with their traditional support in the business community and their powerful base of wealthy donors.

As a result of these transformations, each party now has both a neoliberal wing and a populist wing, which are more or less united on cultural and identity issues but are currently papering over deepening internal differences on class and economics.¹⁰⁶ As voting populations slowly evolve, the internal fissures within each party will grow larger and more salient. Our current structure of deeply polarized party coalitions—which is now organized primarily around zero-sum issues of identity and status—will gradually be replaced by a new structure of party competition in which class and economic issues will increasingly dominate. This process of evolution will slowly reduce polarization and offer, once again, the possibility of cross-party alliances.¹⁰⁷

Demographic changes are another important factor; the country is slowly becoming less white.¹⁰⁸ In the short run, this will make political polarization worse and lead to increasing racial tensions because many whites will feel threatened as they see themselves becoming a political minority. As non-white minorities make political, social, and economic gains, the perception that white dominance is ebbing will embolden fringe white supremacist groups.¹⁰⁹

But in the long run, these changes will cause polarization between the two major parties to decline. That is because demographic shifts in

106 *Id.* at 168–69.

107 *Id.* at 166–74.

108 William H. Frey, *The US Will Become 'Minority White' in 2045: Census Projects Youthful Minorities Are the Engine of Future Growth*, BROOKINGS: THE AVENUE (Mar. 14, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/>.

109 See Katanga Johnson & Jim Urquhart, *White Nationalism Upsurge in U.S. Echoes Historical Pattern, Say Scholars*, REUTERS (Sept. 4, 2020), <https://www.reuters.com/article/us-global-race-usa-extremism-analysis/white-nationalism-upsurge-in-u-s-echoes-historical-pattern-say-scholars-idUSKBN25V2QH> (noting historical pattern that “any expansion of civil rights for a minority group leads to a rise in intolerance”); Char Adams, *‘Vintage White Rage’: Why the Riots Were About the Perceived Loss of White Power*, NBC NEWS (Jan. 7, 2021), <https://www.nbcnews.com/news/nbcblk/vintage-white-rage-why-riots-were-about-perceived-loss-white-n1253292> (connecting assault on Capitol by white supremacist groups to perceived loss of white power and status); Hakeem Jefferson, *Storming the U.S. Capitol Was About Maintaining White Power in America*, FIVETHIRTYEIGHT (Jan. 8, 2021), <https://fivethirtyeight.com/features/storming-the-u-s-capitol-was-about-maintaining-white-power-in-america/> (arguing that a perceived loss of white dominance leads to loss of faith in democracy, and, among extremist elements, increasing resort to violence).

the voting population give both parties incentives to become multiracial coalitions. This, in turn, will give each of them incentives to move away from the racially polarized politics of the past forty years as they fight about economic issues that can appeal across the different parts of their respective coalitions.¹¹⁰

The Democrats have an obvious head start in this project; their coalition is already multiracial. In contrast, the Republicans currently seem to be trapped in a cul-de-sac. They are still trying to win elections with a shrinking base of white working-class voters while attempting to restrict the non-white vote. Eventually, however, Republicans will have to expand and alter their coalition. They will have to attract increasing numbers of minority voters to survive as a national party.¹¹¹ As the two-party coalitions evolve, so too will the political terrain on which they will fight.

To be sure, this is only one possible future, and things will not change overnight. Even if my analysis is correct, we may still have to slog through many more years of bitter status-driven politics with deep mutual hatreds. But eventually, party coalitions will begin to look different, and the central issues of contention between the two parties will begin to change. Americans will begin to abandon the zero-sum politics of identity and culture for a more complicated mix of disputes. Politics will remain contentious, but the fights will be more complex and variegated, creating new possibilities for compromise.

110 See Jack M. Balkin, *Race and the Cycles of Constitutional Time*, MO. L. REV. (forthcoming 2021) (manuscript at 31–34, 42) (on file with author).

111 *Id.*

CONCLUSION: ROT AND RENEWAL

Although we are slowly and painfully approaching the end of our Second Gilded Age, the election of 2020 suggests that we are not there yet. But we should not assume, as many people fear, that our democracy is doomed. If Americans mobilize for change, we may witness the beginning of a Second Progressive Era of reform both at the state and federal levels. And because the next dominant coalition is likely to be multiracial, we may even see a Third Reconstruction that will address racial injustices long ignored.¹¹²

One should not romanticize these possibilities. The Progressive Era of the early twentieth century was highly imperfect. It was not only a period of reform but also a period of social unrest, heightened racial tensions, and violence, including lynchings and race riots.¹¹³ It was anything but a calm and placid time.¹¹⁴

The point of my comparison to the Progressive Era is that periods of constitutional renewal can and do follow periods of constitutional rot that seemed altogether hopeless. But what makes the renewal of democratic institutions possible? Renewal has two prerequisites. The first is mobilization. The second is destruction.

The 1960s and 1970s were a period of considerable mobilization in American politics, but sometime around the 1980s, politics began to demobilize. In the 2010s, however, Americans got a jolt of new political energy, starting first on the right with the Tea Party, and then on the left with the Black Lives Matter movement, the Women's March and other anti-Trump mobilizations, and the protests that followed the murder of George Floyd in the spring of 2020.

The Trump years have been a period of continuous agitation on the left and the right, although these protests haven't come together in a single focal point. Turnout for the 2020 election was very large, and the percentage of Americans who voted was the highest in a century.¹¹⁵ What comes of all

112 This paragraph is adapted from Balkin, *supra* note 16.

113 See ANN V. COLLINS, *ALL HELL BROKE LOOSE: AMERICAN RACE RIOTS FROM THE PROGRESSIVE ERA THROUGH WORLD WAR II*, at xv–xvi, 1–3 (2012) (describing patterns of racial violence directed against African-Americans in the first half of the twentieth century); DAVID W. SOUTHERN, *THE PROGRESSIVE ERA AND RACE: REACTION AND REFORM, 1900–1917*, at 29, 107, 134–35, 185 (2005) (chronicling the Progressive Era's history of racial violence).

114 It was also a period of racial retrenchment in which the Republican Party essentially gave up on protecting the rights of African-Americans. For reasons why a Second Progressive Era may be different, see Balkin, *supra* note 110.

115 Kevin Schaul et al., *2020 Turnout Is the Highest in over a Century*, WASH. POST (Nov. 5, 2020), <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/>.

this mobilization, of course, is yet to be determined. But at the very least it signals possibilities for political transformation.

Destruction often precedes renewal and clears a path for renewal. Each new political regime builds on the wreckage of older ones.¹¹⁶ Sometimes a new regime actively dismantles the old regime. But sometimes the old regime is already self-destructing, and the new regime simply builds on its wreckage. The GOP built on the ruins of the Civil War. The New Deal emerged in the wake of the Great Depression, shoved aside the *laissez-faire* assumptions of the older Republican regime, and built a new politics that expanded and consolidated the administrative, regulatory, and welfare state. In like fashion, a new regime led by Democrats, if successful, might reject the neoliberal assumptions of the Reagan regime, respond to the destruction and chaos of Trump's presidency, and begin a new phase of American state-building.

Sadly, the renewal of American democracy usually does not occur without calamity and disaster. The constitutional rot of the 1850s was cured only by the destruction of the Civil War. The constitutional rot of the First Gilded Age, and the inequalities of wealth that helped produce it, eventually receded, but a major cause was two world wars and a great depression. Can we avoid something so terrible in renewing our democracy a third time? I hope so, but that hope is not a prediction. Yet if we focus on what has already been destroyed, we can glimpse a few clues about how renewal might come about.

For good or for ill, Donald Trump is the great destroyer of American politics. He has shattered the old version of the Republican Party, he has unraveled significant swaths of the American government, and he has shredded political norms of democracy and decency. Because Trump has been such a reckless destroyer of things, both good and bad, he has unwittingly opened up opportunities for repair and renewal in the years to come.

Through incompetence and self-absorption, Trump has bungled the country's response to the pandemic, rejecting the views of scientists, spreading conspiracy theories and propaganda, and failing to take steps that would have alleviated great human misery and suffering. The pandemic, in turn, has generated an economic contraction, and we do not know how quickly the country will bounce back once vaccines are distributed. Yet another catastrophe has been occurring in slow motion: climate change, which has increased damage from fires, floods, and hurricanes, and threatens

116 BALKIN, *CYCLES*, *supra* note 1, at 12–19.

even more damage and human suffering in the years to come.¹¹⁷

How the public understands these problems, and whether they blame the Trump Administration for failing to deal with them, is yet to be determined. In any case, Trump's failures at dealing with the pandemic have unwittingly generated pressures for more energetic government to solve the nation's problems. They have created new constituencies for government programs and redistributive reforms.

The mere fact that Trump has created these opportunities for political change, however, does not guarantee that the Democrats will successfully capitalize on them. If an ascendant party successfully manages the problems it has inherited, its leaders will be rewarded. But if its leadership fails, the party will be punished, and the public will look elsewhere for solutions.¹¹⁸ A new regime doesn't have to succeed completely or brilliantly to gain the public's confidence. Republican Reconstruction was only a partial success, and significant parts of it were eventually abandoned. Yet a majority of voters saw the Republican Party as the savior of the Republic, and the GOP retained its political dominance for many years. Franklin Delano Roosevelt did not completely succeed at alleviating the economic problems brought on by the Great Depression, which were not really resolved until World War II. Yet the public appreciated his leadership and his efforts, and this allowed Roosevelt and his party to forge a new political regime that lasted for decades.

In his inaugural address, President Trump promised an end to American carnage.¹¹⁹ Instead he allowed it to grow. The unnecessary loss of life during the pandemic cannot be replaced. But other things Trump has damaged or destroyed will have to be rebuilt, and this will create new constituencies and alter existing ones.

The renewal of our institutions is hardly guaranteed. It will require a great deal of mobilization, a great deal of commitment, and a great deal of

117 William Mayer argues that new political regimes do not take advantage of demographic change but rather achieve political dominance in the wake of catastrophes. Successful new regimes form because they help the country deal with catastrophes that occurred under the old regime's watch. William G. Mayer, *The Cycles of Constitutional Time: Some Skeptical Questions*, 13 NE. UNIV. L. REV. 655, 663–64 (2021). Mayer doubts that the pandemic and the economic contraction that have accompanied it are severe enough to count as a regime-changing catastrophe. *Id.* at 664. Whether or not Mayer's characterization of the severity of the pandemic is correct, his emphasis on catastrophe may point only to a sufficient condition for regime change, and not a necessary condition. It may help account for the regime changes in 1860 and 1932, but it does not really explain the regime changes in 1800, 1828, and 1980.

118 *See id.* at 664–65.

119 Donald J. Trump, *Inaugural Address*, AM. PRESIDENCY PROJECT (Jan. 20, 2017), <https://www.presidency.ucsb.edu/documents/inaugural-address-14>.

political fighting. It won't be pretty. We should not expect that the next two decades will go smoothly, or even the next three. But American democracy, although damaged, has not failed yet. The resources for renewal are present, if we have the courage to use them.