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# The Recent Unpleasantness: Understanding the Cycles of Constitutional Time

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# THE RECENT UNPLEASANTNESS: UNDERSTANDING THE CYCLES OF CONSTITUTIONAL TIME

JACK M. BALKIN\*

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## INTRODUCTION

“The Recent Unpleasantness” is one of several Southern euphemisms for the American Civil War.<sup>1</sup> It is also a fitting description of our current political predicament. Of course, I am not suggesting that the United States is currently in the middle of a civil war, or that we will soon be in a civil war. Rather, the expression conveys a widespread feeling that something has gone seriously wrong with constitutional democracy in the United States. The stark political and cultural polarization of American life, the raucous 2016 election, and the tabloid meanderings of the Trump Presidency have only seemed to confirm a growing despair about the future of democracy in America.

This Article, however, takes a longer view, and argues that the malaise is only temporary. I will use tools from constitutional theory and from political science to try to explain what is happening to American politics. But first, let me offer a little astronomical diversion.

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\* Knight Professor of Constitutional Law and the First Amendment, Yale Law School. This Article is based on the Addison C. Harris Lecture that I gave at Indiana University on September 13, 2017. My thanks to Dawn Johnsen and the members of the Indiana University Maurer School of Law faculty for the invitation and for their gracious hospitality.

1. These include “the War Between the States” and “the War of Northern Aggression.” ELAINE MARIE ALPHIN, *AN UNSPEAKABLE CRIME: THE PROSECUTION AND PERSECUTION OF LEO FRANK* 23 (2010) (listing multiple Southern euphemisms for the Civil War).

## I. THINKING IN TERMS OF CYCLES

On August 21, 2017, an amazing event occurred over large parts of the United States: a total eclipse of the sun.<sup>2</sup> These are very rare occurrences, especially this one, which moved across almost the entire breadth of the United States.<sup>3</sup> In early times, eclipses were frightening events. They came suddenly; people feared that magical powers were at work and that the sun would never return. We don't fear eclipses today, of course, because we know that they are natural phenomena caused by the concatenation of different cycles. The sun and moon, when viewed from the earth, are just about the same size, depending on the earth's orbit around the sun, and the moon's orbit around the earth. And so, when the earth is at a particular position in its cycle around the sun, and the moon is in a particular position in its cycle around the earth, and the three line up in just the right way, the disc of the moon covers the disc of the sun for a brief period of time.<sup>4</sup> It is an amazing spectacle, and some people have called it a life-altering event. Stunning as these events are, we know that they will soon be over.

Our present condition is a little like an eclipse, although much less enjoyable. To understand what is going on today in America, we have to think in terms of political cycles that interact with each other and create remarkable—and dark—times.

In American constitutional law, however, people tend not to think in terms of cycles. Rather, they think about time in linear terms. The two most well-known approaches to constitutional interpretation in the United States involve linear visions of time. One is originalism, and the other is living constitutionalism.

Originalism is linear because it rests on an implicit story—about how we have moved further and further away from the moment in time that grounds the authority of the Constitution and the correct meaning of the Constitution. To interpret the Constitution correctly, we must restore the meaning at a moment that has long since passed.<sup>5</sup> We must return to that moment, metaphorically speaking. We must restore the correct interpretation and not stray from it again. The problem of interpretation arises precisely from the fact that time is linear: that we move ever further away from the moment that grants authority.

Originalism can also be a story of decay—a concern with what we have lost and about the need for restoration and renewal. As we move further and further away in time from the source of constitutional meaning and authority, we make mistake after mistake in our interpretations of the Constitution. Judges in particular are tempted to stray from the original meaning and impose their personal predilections. So we must find a way to retrace our steps and return to the original meaning that is

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2. NASA, *Total Solar Eclipse August 21, 2017*, TOTAL ECLIPSE, <https://eclipse2017.nasa.gov> [<https://perma.cc/LBP4-EQLW>].

3. *Id.*

4. NASA, *How Eclipses Work*, TOTAL ECLIPSE, <https://eclipse2017.nasa.gov/how-eclipses-work> [<https://perma.cc/8CPW-XGLH>].

5. See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 459 (2013) (“[A]ll of [the] members of the originalist family agree on a core idea—meaning is fixed at the time of origin.”).

the source of constitutional authority. That is the only way to restore and ground our constitutional system.

The other standard theory of constitutional interpretation is called living constitutionalism. This is the idea that as history progresses, so too should our Constitution.<sup>6</sup> In every day, in every way, our Constitution is becoming a better constitution—or at least, we should interpret the Constitution to make it so. Living constitutionalism also has a linear theory of time, because it rests on an implicit story of progress. We no longer live in the time of the Founders. We have left them behind. We honor the Founders' achievements in their time, but they are long dead. Their views may have been good enough for their day (or maybe not—after all, they owned slaves!). But their opinions may well be inadequate for our very different times and circumstances. Most living constitutionalists assume that if we adapt the Constitution to changing circumstances, this will represent improvement rather than decline, and gradual progress rather than gradual unraveling.<sup>7</sup> In other words, the theory implicitly rejects the idea that moving away from the past and forward in time signifies decay or loss. The arc of history is long, but it bends towards justice. If we keep the Constitution in touch with the times, it will not only function better, but it will approach justice as well.

These views are obviously opposed to each other, and yet it's worth noting what they have in common. They are linear conceptions of time. We move away from the past, for good or for ill.

But that is not the only way to think about historical change. If you asked the Ancient Greeks or the Ancient Chinese, they would have disagreed. They would have argued that history moves in cycles, not in straight lines away from the past.<sup>8</sup> In order to have a cyclic view of history, you don't have to believe that things occur

6. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 277 (2011) (explaining that living constitutionalism is “the claim that the Constitution adapts—and should adapt—to changing times and conditions, and reflect the evolving values of the American people”).

7. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (“[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

8. W. K. C. GUTHRIE, *IN THE BEGINNING* 63 (1957) (“[T]he Greek mind was especially attracted [to] the idea that as in space, so in time, the cosmic movement was circular. Everything returns to what it was before, and what has been will be again.”); ENDYMION WILKINSON, *CHINESE HISTORY: A MANUAL* 513 (rev. & enlarged ed. 2000) (describing the five-phase theory of cycles of Chinese history). The great Chinese Classic of Changes, or *I Ching*, is structured as a cycle of situations through which time and events flow. See JACK M. BALKIN, *THE LAWS OF CHANGE: I CHING AND THE PHILOSOPHY OF LIFE* (2009).

The Greek historian Polybius offered the most famous version of cycles in politics, arguing that regimes cycled among monarchy, aristocracy, and democracy, with each form deteriorating and leading to the next. 3 POLYBIUS, *THE HISTORIES* bk. VI, at 299–315 (W.R. Patton, F.W. Walbank & Christian Habicht trans., Loeb Classical Library ed. 2011). Polybius's concept of cycles and the inevitable corruption of forms of government influenced Italian Renaissance thinkers such as Machiavelli and eventually, through multiple transformations, the Founding generation in the United States. 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).

exactly in the same way they occurred before. Rather, you can take the view, often attributed to Mark Twain, that history doesn't repeat itself, but it does rhyme.<sup>9</sup>

That is the general approach I will develop in this Article. I invite you to think of the events that we are going through like the strains of a ballad that repeatedly returns to its refrain, although with many changes and variations along the way.

But of course, things are not quite as simple as that. What is especially interesting about our current situation is that there is more than one cycle at work. In fact, there are three. And when these three cycles converge, when they all line up in a certain way, the result is a sort of political eclipse of the sun, a very dark and disturbing time. What one gets, in other words, is the recent unpleasantness.

Of course, the cycles that I will discuss here are quite different from the cycles that cause the eclipse of the sun. They arise through the interaction of political will with institutional structures. People cause these cycles through mobilization, organization, and the exercise of political will in a particular institutional environment. The institutions shape the actions, while the effects of the actions slowly remake the institutions.

In this Article, I will talk about what I expect is going to happen in the next five to ten years. Unlike eclipses, however, one can't be entirely sure of the future. Politics is not astronomy, and human affairs do not operate like clockwork. Moreover, we can't assume that everything is already foreordained: that if people simply sit on their hands and do nothing, the cycles I describe in this lecture will take care of themselves. Quite the contrary. I am telling a story about what happens in the long run, but it is not a deterministic story. The actions of many individuals over time, pursuing their values and interests, but constrained by institutional arrangements, will tend to cycle in intelligible ways. But people have to actually pursue those interests. They have to be motivated to respond to the problems they face. Above all, they can't allow themselves to be overcome by despair and paralyzed into inaction.

Of course some people do despair today. They fear that we are headed inexorably toward fascism, authoritarianism, and the end of democracy. That is not what I think is going to happen. Nor do I expect that the American public will sit on its hands. I believe that Americans will respond to the misfortunes of our present age, just as they have many times before. And for that reason, although I will mention our current President at various points in my discussion, I will not be delving into great detail about the crazy and often disturbing things that have happened since his election. Instead, I will view him, and the party he leads, as exhibiting the effects of the cycles of constitutional time on political life in America.

My purpose, then, is not to tell people that their democracy will take care of itself without any effort on their part. Rather, it is to offer a bit of hope for people who read the news every day and fear that things are only going to get worse. Hope does not guarantee action, but it makes beneficial action more likely. If people

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9. It is not clear that Twain ever actually said this. The closest example comes from 2 MARK TWAIN & CHARLES DUDLEY WARNER, *THE GILDED AGE* 178 (Harper & Brothers 1915) (1873) ("History never repeats itself, but the kaleidoscopic combinations of the pictured present often seem to be constructed out of the broken fragments of antique legends.").

misunderstand our situation, and conclude that American decline is inevitable, they may unwittingly help to make that fate a reality; but if they understand the cycles of constitutional time, they may come to believe that their democracy can be redeemed, and do their part to realize that worthy goal.

What are the three cycles at work in American politics? The first is the cycle of the rise and fall of political regimes in American history. The second is the cycle of polarization and depolarization. And the third is the decay and renewal of republican government, which I call the cycle of constitutional rot and constitutional renewal. Each of these cycles operates on a different time scale. I will introduce each of them in turn, and explain how they interact. Together, the interaction of these three cycles—of the rise and fall of regimes, of polarization and depolarization, and of rot and renewal—generate *constitutional time*.<sup>10</sup> Think of the analysis that follows like a chronometer that tells you where we are in constitutional time.

Before I describe these cycles in detail, however, it might be helpful to offer four central points that will frame my argument. First, we are not in a constitutional crisis. Second, we are suffering from a severe case of constitutional rot. Third, we are at (what one can only hope is) peak polarization, and this polarization is connected to constitutional rot. Fourth, and perhaps most important, our recent unpleasantness is only a temporary condition. We are in transition, a very difficult, agonizing, and humbling transition, but a transition nevertheless.

When I say that it is a temporary condition, however, I do not mean that things will go back to the way they were before the 2016 election. They will not; they cannot. We are in transition to a new constitutional order, with a new party structure, and with many new and unfamiliar elements.<sup>11</sup> The recent unpleasantness is the awkward, uncomfortable, and occasionally frightening transition to that new political order.

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10. The expression “constitutional time” is not original with me, but I use it in a specific way—to describe the interaction of multiple cycles of change that affect the fortunes of a constitutional democracy. For a different usage, see Richard Alexander Izquierdo, *The Architecture of Constitutional Time*, 23 WM. & MARY BILL RTS. J. 1089, 1091 (2015) (defining “constitutional time” as “the extraordinary historical events that destabilize the regime and open space for new interpretations and constructions to change or supplement constitutional meaning”). Both Izquierdo and I adapt the term from Stephen Skowronek’s concept of *political time*, discussed in Part II. Skowronek’s political time concerns one of the constituent cycles of constitutional time: the rise and fall of political regimes. See *infra* Section II.A.

11. Jack M. Balkin, *The Last Days of Disco: Why the American Political System is Dysfunctional*, 94 B.U. L. REV. 1159, 1160–61 (2014) (arguing that the United States is in a long and difficult transition between political regimes); cf. Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE 1, 3 (Aug. 2018), [https://michiganlawreview.org/wp-content/uploads/2018/08/117MichLRevOnline1\\_Primus.pdf](https://michiganlawreview.org/wp-content/uploads/2018/08/117MichLRevOnline1_Primus.pdf) [https://perma.cc/3EN7-BZA4] (“[T]he conditions that made the twentieth-century system [of democracy in the United States] possible are gone, and they aren’t coming back.”).

## II. THE CYCLE OF REGIMES

Our current political problems stem from the fact that we are in the final days of a crumbling, decadent political regime, and no new regime has yet appeared to take its place. This is a difficult and agonizing transition, a very sad time in American life. Its difficulty is enhanced by the fact that this transition between political regimes occurs at a time of peak polarization<sup>12</sup>—the crest of the cycle of polarization and depolarization—and at the low point of a cycle of constitutional rot.<sup>13</sup> For that reason, the transition to a new political regime is going to be very difficult. But we will get through it. And when we get through it—about five to ten years from now—the present will seem like a distant, unhappy nightmare, or an illness from which one has recovered. Our politics will be quite different.

Many people my age or older have lived through another transition between political regimes, although they may not remember it as such. The last transition was not half as wrenching as this one. It occurred in the last years of the 1970s though the first years of the 1980s.<sup>14</sup> In a lecture I gave five years ago, I referred to it as “The Last Days of Disco.”<sup>15</sup> This was the transition from the final years of the New Deal/Civil Rights regime, when Jimmy Carter was President, to the current regime we are living in now, the regime begun by Ronald Reagan, which I will call the Reagan regime.<sup>16</sup>

The transition from the New Deal/Civil Rights regime to the Reagan regime did not occur in circumstances as fraught as ours. First, it was not a time of strong polarization.<sup>17</sup> Polarization had been growing slowly since the 1960s, but it really took off during the Reagan regime, for reasons I will describe.<sup>18</sup> In fact, one of the characteristic features of the Reagan regime is the development of political parties with strong polarization and conflict extension.<sup>19</sup> Polarization means that people in the two parties disagree strongly on particular issues. But they might still agree on some things, or there might be policy disagreements that cross party lines. Conflict extension means that Democrats and Republicans have simultaneously become polarized on multiple policy dimensions and multiple policy issues, even

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12. Lee Drutman, *American Politics Has Reached Peak Polarization*, VOX (Mar. 24, 2016, 4:20 PM), <https://www.vox.com/polyarchy/2016/3/24/11298808/american-politics-peak-polarization> [<https://perma.cc/RDL4-XM9B>]; see also Jeff Lewis, *Polarization in Congress*, VOTEVIEW.COM (Mar. 11, 2018), [https://www.voteview.com/articles/party\\_polarization](https://www.voteview.com/articles/party_polarization) [<https://perma.cc/5VZB-DUJA>] (graph of “Liberal-conservative partisan polarization by chamber”). Focusing on partisan distance between the two major parties in Congress, Lewis notes strong polarization in the 1880s and 1890s followed by a steep decline bottoming out in the 1930s and significant increases following 1984, leading to a new peak, even more severe than the 1890s, in the present. See Lewis, *supra*.

13. I discuss constitutional rot in Part V, *infra*.

14. Balkin, *supra* note 11, at 1159.

15. *Id.*

16. *Id.*

17. See Lewis, *supra* note 12 (showing that in the late 1970s, polarization was still modest).

18. See *infra* text accompanying notes 65–71.

19. See Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and “Conflict Extension” in the American Electorate*, 46 AM. J. POL. SCI. 786, 789 (2002).

issues that ostensibly have little to do with each other, so that all of the disagreements line up.<sup>20</sup>

Just as the change of regimes in the late 1970s did not occur during a period of strong polarization and conflict extension, it also did not occur during a period of advanced constitutional rot. The rot mostly came later. As I will also describe, a characteristic feature of the Reagan regime is a series of policy decisions that significantly increased economic inequality, and this, together with increasing party polarization, made the political system especially susceptible to constitutional rot.

To explain these ideas in more detail, I will begin with the central idea of constitutional regimes and explain the life cycle of these regimes. To do this, I will draw on the work of a distinguished political scientist and scholar of the presidency, Stephen Skowronek, at Yale University. He developed a theory of Presidential leadership within political regimes that has been very influential, and deservedly so.<sup>21</sup>

Here is the big idea: American political history is a series of successive governing regimes in which political parties compete.<sup>22</sup> Within each regime one of the political parties tends to dominate.<sup>23</sup> That doesn't mean that the party wins all

20. *See id.*

21. *See* STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1997) [hereinafter SKOWRONEK, *THE POLITICS PRESIDENTS MAKE*]; STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISAL AND REAPPRAISAL* 135–36 (2d ed. 2011) [hereinafter SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME*].

22. *See* KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 61 (2004); Andrew J. Polsky, *Partisan Regimes in American Politics*, 44 *POLITY* 51, 52–53 (2012). The idea of political regimes emerged from earlier political science models that focused on electoral realignments and critical elections, but scholars have shown that these earlier approaches have serious shortcomings. *See, e.g.*, DAVID R. MAYHEW, *ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE* (2002). As a result, regime theories no longer rest on a particular theory of realigning elections. *See* Polsky, *supra*, at 56–57.

One can define regimes in terms of successful parties that successfully manage to set the terms of political debate for extended periods of time, no matter how electoral alignments change underneath them. For example, although electoral patterns changed greatly between 1860 and 1932, the Republican Party remained the dominant political party in the United States. Along these lines, Polsky defines a partisan regime as “a political coalition organized under a common party label that challenges core tenets of the established political order, secures effective national governing power, defines broadly the terms of political debate, and maintains sufficient power to thwart opposition efforts to undo its principal policy, institutional, and ideological achievements.” *Id.* at 57.

In the alternative, one can define a regime in terms of how it replaces older government arrangements with new and lasting ones. The New Deal's reconstruction of American governance is a good example. *See, e.g.*, Karen Orren & Stephen Skowronek, *Regimes and Regime Building in American Government: A Review of Literature on the 1940s*, 113 *POL. SCI. Q.* 689, 693 (1998–99) (describing regime building as “a form of elite engineering . . . [that] stabilize[s] . . . governmental operations around a new set of political assumptions”).

23. Polsky, *supra* note 22, at 52 (“[N]ewly dominant parties propel bursts of broad political change and then preside over longer interludes of relative stability.”); *see also* SKOWRONEK, *THE POLITICS PRESIDENTS MAKE*, *supra* note 21, at 35 (noting that Presidents



of the elections. But it does win most of the elections, and the party's ideals and interests construct the basic agenda for politics during the regime.<sup>24</sup> Put another way, the dominant party sets the baseline of what is considered possible and impossible politically. It structures the basic ideological assumptions of politics of its time. To give only one example: the current regime—the Reagan regime—has been shaped by the agendas of American conservatism and neoliberal ideology. Its vision of politics is very different than the ideological assumptions of the previous constitutional order—the New Deal/Civil Rights regime, a period that featured expansion of government regulation and social insurance programs, powerful labor unions, and the civil rights and civil liberties revolutions of the 1950s and 1960s.<sup>25</sup>

A political coalition supports the dominant party. That coalition brings it into ascendance and keeps it in power. Eventually the coalition changes and fractures as a result of changing circumstances. These include demographic changes—the succession of generations and waves of immigration—economic changes, cultural changes, technological changes, and so on.

Moreover, successful coalitions are often the victims of their own success.<sup>26</sup> As they achieve policy victories, they change the political world around them. They create institutional impediments that make further change difficult. Their opposition regroupes in new and more effective ways. Elements of the dominant party divide into factions and some become radicalized and demanding. Compromise becomes more difficult. Parts of the coalition become impatient and feel increasingly slighted or marginalized; they demand that the coalition take care of their needs. The dominant party's familiar approaches to politics—its agendas and its habitual solutions to policy problems—increasingly seem out of touch and irrelevant to the problems of the present. The coalition shrinks and fragments. It becomes weak and debilitated, and this creates an opening—not always successfully taken—for a different party to begin a new regime. The new party is supported by a new political coalition, and it promotes a different set of commitments of ideology and interest.

What I have just described is the life cycle of a political regime in American politics. A party that was once subordinate gradually grows in strength. It forms a rising coalition. It dominates politics. It promotes its distinctive agendas of ideology and interest. Its influence peaks. It becomes the victim of its own success. Its factions struggle with each other. It weakens, it withers, and it is eventually pushed aside by a new regime headed by another political party.

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are either allied with the dominant party or form part of the opposition); Jack Balkin, *Obama Hoped to Be a Transformational President. He Failed.*, Vox (Jan. 19, 2017), <https://www.vox.com/the-big-idea/2017/1/19/14323552/obama-legacy-reagan-clinton-conservative-liberal> [<https://perma.cc/Z2Z2-5MQ8>].

24. See *supra* note 22.

25. See Balkin, *supra* note 11.

26. *Id.* at 1170–71.

Table 1: The Cycle of Regimes in American Constitutional History

Name	Years	Dominant Party	Opposition Party
Federalist	1789–1800	Federalists	Jeffersonians
Jeffersonian	1800–1828	Democratic-Republicans	Federalists (until mid-1810s)
Jacksonian	1828–1860	Democrats	National Republicans; Whigs (after 1834); Republicans (after 1854)
Republican	1860–1932	Republicans	Democrats
New Deal/Civil Rights	1932–1980	Democrats	Republicans
Reagan (Second Republican)	1980–?	Republicans	Democrats

As Table 1 indicates, this cycle has happened about six times in American history.<sup>27</sup> The first regime is led by the revolutionary party, the Federalist Party, which loses power in 1800 and eventually falls apart. The next regime is the Jeffersonian regime, which begins with Thomas Jefferson’s election in 1800. It is so dominant that for a brief time the United States effectively has one-party rule. This is sometimes known as the “era of good feelings.” But that expression disguises a growing set of disagreements and factions. The good feelings don’t last, and the Jeffersonian regime begins to fall apart in 1824, with a contested election that is thrown into the House of Representatives. The Jeffersonian regime is succeeded by the Jacksonian regime, beginning with Andrew Jackson’s election in 1828. This regime is led by the Democratic Party, the first mass political party, the party of the white working man, and also the party of slavery. Eventually it becomes the vehicle and the mouthpiece for the Slave Power.

The Jacksonian regime falls apart because of increasing factionalism and radicalism among defenders of slavery, who try to preserve and extend their political power as the country develops into its western territories. This leads to the original “recent unpleasantness”—the American Civil War. Political struggles over the growth of slavery destroy the old Jacksonian coalition—as well as the coalition of the opposition party, the Whigs—and create an opening for a new regime, led by the ascendant Republican Party, created in 1854.

The Republican Party is the party of the Union, and following the Civil War, it dominates American politics for a very long time; for this reason it well deserves its nickname of the Grand Old Party or GOP. The first Republican regime is the longest-lived regime in American history. It lasts from 1860 until 1932. The Republican regime weakens, however, with the increasing corruption of the Gilded

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27. See ORREN & SKOWRONEK, *supra* note 22, at 61; Polsky, *supra* note 22, at 52. Some scholars treat the realigning election of 1896 as the beginning of a new Republican regime, while others, like Skowronek, do not. See SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 21, at 230–33 (arguing that Theodore Roosevelt was still working within the Republican regime created in 1860).

Age. The Democrats—the party of the old South, slavery, and secession—eventually grow stronger. They retake the House in 1874 and finally return to the presidency in 1884, almost twenty years after the conclusion of the Civil War. The Democrats have a chance to start a new regime in the 1896 election, allied with the insurgent populists. But for complicated reasons, the Democrats blow their chance, the Republicans regroup under William McKinley, and the Republican regime is revived and continues until the New Deal.

The Republican regime, however, is finally done in by the Great Depression. It is succeeded by the New Deal/Civil Rights regime, which begins with Franklin Roosevelt's election in 1932. The Democrats, with a new coalition that includes Catholic immigrants, city dwellers, and labor unions, become the dominant party. In contrast to the Civil War era, national politics is quite depolarized, and most political achievements result from a series of bargains between three coalitions: Northern Democrats, Southern Democrats, and Republicans. This is the regime that creates the modern state and eventually passes the great civil rights acts.

The New Deal/Civil Rights regime is the victim of its own success. The Democratic Party begins to split apart during the 1960s—in part because of disputes over race and the Vietnam War—and members of its Southern wing start to leave the party. What we now call the culture wars begin. The 1970s witness the emergence of the New Right and a collection of conservative social movements; they will eventually remake the Republican Party in their own image.

The New Deal/Civil Rights regime is on its last legs in the 1970s, buffeted about by internal dissention and economic stagnation. The collapse of the New Deal/Civil Rights regime creates the opening for the emergence of the Reagan regime, which begins with Reagan's election in 1980. The conservative movement gradually takes over the Republican Party, revives it, and pushes it decidedly to the right. The Republican Party becomes the dominant national party, and it sets the agenda for national politics for decades. This is the regime of neoliberalism, deregulation, declining labor unions, and lower taxes—especially for the wealthy.

This is the regime we have been living under through most of my adult life. And this is the regime that is cracking up before our eyes. For the better part of a decade, the Republican Party has been radicalized and factionalized; it has been undergoing either a civil war or a nervous breakdown.<sup>28</sup> Polarization and mutual distrust between the parties has become endemic. The party has been taken over by populist demagogues and con artists, of whom Donald Trump is only the most recent example. The party is momentarily united under Trump's brand of populist nativism. Even so, the party looks ripe for an electoral reckoning, if not in 2020, then in the next few election cycles.

Of course, one could have said the same thing in 2008, but it didn't happen. Barack Obama and an emerging coalition of women, minorities, suburbanites, and professionals—the “coalition of the ascendant”<sup>29</sup>—were not able to inaugurate a new political regime. After two terms of Obama's presidency, the rising coalition

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28. Balkin, *supra* note 11, at 1170.

29. 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”).

was not yet strong enough to elect Hillary Clinton in 2016.<sup>30</sup> Even so, the Reagan regime is far weaker and internally conflicted than it was in 2008. The old regime is dying, but a new regime has yet to be born.

Why do I say that this regime is dying? For those who follow American politics, that statement might seem quite strange. In an important sense, the Republican Party is stronger now than it has been for almost a century.<sup>31</sup> Following Trump's 2016 victory, commentators pointed out that the Republicans haven't dominated national politics this much since 1928, when the party controlled all of the branches of government.<sup>32</sup> Nineteen twenty-eight . . . . Gee, I wonder what happened after that . . . .

After the election of Donald Trump in 2016, the Republican Party controlled the Presidency and both houses of Congress. It had a Supreme Court majority, controlled more than half of the governorships, and had unified control of the legislature in thirty-three states.<sup>33</sup> (Some of this, of course, may change following the mid-term elections in 2018). On paper, at least, The Republican Party appears to be a strong and robust political party, especially at the state and local level.

At the national level, however, the regime has many weaknesses, some overt and some hidden.

First, the Reagan regime, like many previous regimes, is a victim of its own success. At the outset its central commitments of ideology and interest were to lower taxes, make government smaller, reduce business regulation, build up national defense, and defeat communism. The Soviet Union was gone by 1991. The War on Terror offered a replacement for Cold War politics, but it led to the policy disaster of the Iraq War. As time goes on, calls for lowering taxes, reducing regulations, and building up defense seem increasingly irrelevant to problems the country faces in the 2010s—stagnant wages, decreasing social mobility, an opioid epidemic, crumbling infrastructure, a decaying educational system, unaffordable health care, and so on. What sounded good in 1980 sounds increasingly stilted and out of touch by 2018.

Second, the regime's commitments of ideology and interest eventually drove a wedge between the party's ideological elites and the party's rank and file, which increasingly consists of white working class voters.<sup>34</sup> These voters may support reducing government programs for the poor, especially if they believe that the

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30. Nate Cohn, *How the Obama Coalition Crumbled, Leaving an Opening for Trump*, N.Y. TIMES (Dec. 23, 2016), <https://www.nytimes.com/2016/12/23/upshot/how-the-obama-coalition-crumbled-leaving-an-opening-for-trump.html> [https://perma.cc/66ZG-WHPZ].

31. Sean Trende & David Byler, *Republican Party the Strongest It's Been in 80 Years*, REAL CLEAR POL. (Nov. 17, 2016), [https://www.realclearpolitics.com/articles/2016/11/17/republican\\_party\\_the\\_strongest\\_its\\_been\\_in\\_80\\_years.html](https://www.realclearpolitics.com/articles/2016/11/17/republican_party_the_strongest_its_been_in_80_years.html) [https://perma.cc/UZX9-XXPW].

32. *Id.*

33. Eric Boehm, *Democrats Got Wrecked Again in State Legislative Races, and It Matters More than You Might Think*, REASON (Nov. 14, 2016), <https://reason.com/blog/2016/11/14/the-2016-election-turned-more-state-legi> [https://perma.cc/PGH2-Y9QH].

34. David Frum, *The Great Republican Revolt*, ATLANTIC (Jan./Feb. 2016), <https://www.theatlantic.com/magazine/archive/2016/01/the-great-republican-revolt/419118> [https://perma.cc/D554-WYVT].

benefits will be enjoyed primarily by racial minorities. But they may not support dismantling Social Security and Medicare and other features of the social safety net on which they depend. Globalization also drove a wedge between businesses' support for free trade and immigration reform and working class opposition to both positions.

Third, the regime strongly supported campaign finance deregulation and First Amendment challenges to campaign finance laws. Deregulation changed how campaigns are financed and ultimately undermined the Republican Party. Deregulation allowed huge sums of money to enter politics and allowed wealthy individual donors to act increasingly independently of the party's organizational leadership. The result was the rise of financial "warlords" who act independent of the party apparatus and who increasingly call the tune in candidate selection and in primary challenges.<sup>35</sup> This encouraged increasingly radical positioning on the right, as candidates lined up to please donors.

Fourth, the Reagan regime also committed itself to the defense of traditional sexual norms, family values, conservative views about race and race relations, opposition to multiculturalism—in short, to fighting the culture wars. Although this often helped mobilize voters, it eventually produced mixed results. Conservatives repeatedly lost key battles in the culture wars, forcing them to perpetually retreat from more conservative positions, for example, on gay rights. These battles over sexuality, as well as the use of racially charged issues to mobilize the base, may have worked well in the short run. But in the long run, they turned off increasing numbers of younger voters, college-educated voters, and women, who became independents or defected to the Democrats.<sup>36</sup>

Fifth, the regime's strategy of polarization, opposition, and obstruction, which helped Newt Gingrich and his successors gain control of Congress and stymie Barack Obama's administration, eventually encouraged internal factionalism, radicalism, and hostility to compromise.<sup>37</sup> This made it more difficult to govern effectively when Republicans were in power.

Sixth, the regime has been increasingly unable to win national Presidential majorities since 1992. From that point on the Republican Party has won the national popular vote only once, in 2004. The other two times it gained the presidency it had to rely on Electoral College victories.<sup>38</sup> The last time this

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35. See, e.g., JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 165–68 (2016) (describing the role of powerful funders who fostered the Tea Party movement); Nicholas Confessore, *Koch Brothers' Budget of \$889 Million for 2016 Is on Par with Both Parties' Spending*, N.Y. TIMES (Jan. 26, 2015), <https://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html> [<https://perma.cc/PC9Y-MJZD>].

36. PEW RESEARCH CTR., *WIDE GENDER GAP, GROWING EDUCATIONAL DIVIDE IN VOTERS' PARTY IDENTIFICATION* 1–2 (Mar. 20, 2018), <https://www.courthousenews.com/wp-content/uploads/2018/03/PewPartyID.pdf> [<https://perma.cc/U94C-6W4Q>].

37. 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* 44 (2012) (describing consequences of Republican strategies of polarization).

38. *United States Presidential Election Results*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863> [[https://](https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863)

happened, in 2016, it lost the popular vote by almost three million votes.<sup>39</sup> The party has had to rely increasingly on partisan gerrymandering and restricting minorities' access to the ballot to maintain political control.

A. *Where Are We in Political Time?*

Seventh, and finally, the current Republican President, Donald Trump, is in an especially precarious position in the life cycle of the Reagan regime. To explain this point, I will need to describe in some detail Skowronek's analysis of the different political situations in which successive Presidents find themselves during the life cycle of regimes. Skowronek calls the progress of these various situations *political time*.<sup>40</sup>

Skowronek classifies the political situation Presidents face—and therefore the kind of Presidents they are likely to become—according to whether they take office when a regime is robust or debilitated, and whether they are allied to the existing regime or opposed to it.<sup>41</sup>

Donald Trump is a Republican who becomes President during the Reagan regime. According to Skowronek, Trump may have inherited one of four possible political situations.

*Reconstructive* Presidents successfully overturn a weakened regime and begin a new one.<sup>42</sup> They lead the opposition party to become the newly dominant party. Examples of reconstructive Presidents are the first Presidents in each new regime: Jefferson, Jackson, Lincoln, FDR, and Reagan. Presidents who achieve such a reconstruction are usually considered as among our most successful.<sup>43</sup> If Trump is a reconstructive President, then he would be trying to overturn Reaganism and the conservative movement and create a new Trumpist regime.

*Affiliated* Presidents are allied with the regime and take office later in political time.<sup>44</sup> They try to keep faith with the regime's commitments under changing circumstances. Skowronek describes them as "orthodox-innovators."<sup>45</sup> Examples in the New Deal/Civil Rights regime would be Truman, Kennedy, and Johnson; examples in the Reagan regime would be George H.W. Bush and George W.

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perma.cc/PX7E-ZW9S].

39. *Id.*

40. SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 21, at 30; SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 21, at 27. Skowronek distinguishes political time from secular time, which describes the evolution of power structures. SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 21, at 30. He argues that as time moves forward, institutions thicken and interests coalesce, making it increasingly difficult for Presidents to displace the existing order and create a new one. *See infra* note 57 and accompanying text.

41. SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 21, at 36.

42. *Id.* at 36–39; SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 21, at 92–98.

43. SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 21, at 94.

44. SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 21, at 41–43; SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 21, at 99–104.

45. SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 21, at 14, 88, 350.

Bush.<sup>46</sup> If Trump were an affiliated President, he would present himself as an orthodox Reaganite who is trying to keep the factions in his party united.

*Preemptive* Presidents come from opposition parties; they swim against the tide of a still powerful regime, so they must compromise, triangulate, and find a “third way.”<sup>47</sup> Examples in the New Deal/Civil Rights regime would be Eisenhower and Nixon; examples in the Reagan regime would be Clinton and Obama.<sup>48</sup> If Trump were a preemptive President, he would be opposed to Reaganism and the conservative movement and seek to find a third way between the two political parties.

The final category, *disjunctive* Presidents, are leaders who come from the dominant party but have the misfortune to take over when the regime is on its last legs.<sup>49</sup> Here the President tries to repair and reform a decrepit regime that has lost its coherence and legitimacy; the leader attempts this by selectively breaking with party orthodoxy in specific ways to shore up public support and reform the party’s base. But because the coalition has become so debilitated and weakened, the leader is not up to the task, and therefore presides over the regime’s dissolution.<sup>50</sup> Jimmy Carter, the last Democrat in the New Deal/Civil Rights regime, and Herbert Hoover, the last Republican in the long Republican regime, are key examples. Disjunctive presidencies are usually regarded as failures.

The following diagram sums up Skowronek’s account of the different styles of presidential leadership:

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46. SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 21, at 99–104.

47. SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 21, at 43–45; SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 21, at 105–13.

48. SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 21, at 105–13.

49. SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 21, at 39–41; SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 21, at 86–92.

50. SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 21, at 39–41.

Table 2. *Presidential Leadership Styles in Skowronek's Theory of Political Time*<sup>51</sup>

President Takes Office:	When the Current Regime Is Vulnerable	When the Current Regime Is Robust
Opposed to the Current Regime	<i>Reconstructive</i> Repudiates old politics and clears ground for a new regime. Examples: Jefferson, Jackson, Lincoln, Roosevelt, and Reagan.	<i>Preemptive</i> Offers a third way to shore up legitimacy. Examples: Tyler, Filmore, Cleveland, Wilson, Eisenhower, Nixon, and Clinton.
Allied with the Current Regime	<i>Disjunctive</i> Coalition falls apart; President presides over the dissolution of the regime. Examples: J. Adams, J.Q. Adams, Buchanan, Hoover, and Carter.	<i>Affiliated</i> Must articulate regime's commitments and balance party orthodoxy against the need for innovation; tries to mollify multiple factions. Examples: Madison, Monroe, Polk, Grant, T. Roosevelt, Taft, Truman, Kennedy, Lyndon B. Johnson, and George H.W. Bush.

Where are we in political time? To decide this question, we should ask which description of presidential leadership best fits Trump's situation.<sup>52</sup>

It is unlikely that Trump is a reconstructive President. He did not run against the philosophy of Reaganism or claim that he sought to displace it. Like other Republican primary candidates, he sought to compare himself to Reagan, and his primary campaign slogan, Make America Great Again, originated with Reagan.<sup>53</sup>

51. This diagram is taken from Balkin, *The Last Days of Disco*, *supra* note 11, at 1180. The information in the diagram is drawn from SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 21, at 36; SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 21, at 85.

52. The next seven paragraphs are adapted from Jack M. Balkin, *What Kind of President Will Trump Become?*, Part I, BALKINIZATION (Nov. 13, 2016, 9:15 AM), [https://balkin.blogspot.com/2016/11/what-kind-of-President-will-trump\\_13.html](https://balkin.blogspot.com/2016/11/what-kind-of-President-will-trump_13.html) [<https://perma.cc/H8S3-EN56>].

53. Bradford Richardson, *Trump Compares Himself to Reagan*, HILL (Sept. 1, 2015), <http://thehill.com/blogs/ballot-box/Presidential-races/252483-trump-compares-himself-to-reagan> [<https://perma.cc/HCS3-9J74>]; Anjali Shastry, *Trump Likens Himself to Reagan as a Truly Conservative Candidate*, WASH. TIMES (Jan. 24, 2016), <https://www.washingtontimes.com/news/2016/jan/24/donald-trump-likens-himself-ronald-reagan-truly-co> [<https://perma.cc/G7FD-DLE2>]; Karen Tumulty, *How Donald Trump Came Up with "Make America Great Again,"* WASH. POST (Jan. 18, 2017), [https://www.washingtonpost.com/politics/how-donald-trump-came-up-with-make-america-great-again/2017/01/17/fb6acf5e-dbf7-11e6-ad42-f3375f271c9c\\_story.html](https://www.washingtonpost.com/politics/how-donald-trump-came-up-with-make-america-great-again/2017/01/17/fb6acf5e-dbf7-11e6-ad42-f3375f271c9c_story.html) [<https://perma.cc/8AZL-BMVQ>] (explaining that Trump was originally unaware that his slogan was based on Reagan's 1980



He has strongly supported the religious right and nominated conservative pro-life judges vetted by the Federalist Society.<sup>54</sup> With only a few important exceptions (to be discussed later), his policies and his judicial appointments have been very conservative and characteristic of a conservative Republican President.<sup>55</sup>

For the same reasons, Trump is not a preemptive President; he did not come into office from an opposition party, trying to swim against the tide of Reaganism and seeking to find a way to compromise with the dominant party or triangulate between the two parties' positions. He is the leader of the regime's dominant party, the Republicans. The members of his party have strongly supported him, not because they like his personal behavior or his political principles (he doesn't seem to have many settled principles), but rather because his policies have been largely consistent with those of a very conservative Republican.<sup>56</sup> The President he most sought to repudiate was not Ronald Reagan but Barack Obama, and if Obama was a preemptive President in the Reagan regime, it's hard to see how Trump could be one too.<sup>57</sup>

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slogan "Let's Make America Great Again").

54. Marc A. Thiessen, *Why Conservative Christians Stick with Trump*, WASH. POST (Mar. 23, 2018), [https://www.washingtonpost.com/opinions/why-conservative-christians-stick-with-trump/2018/03/23/2766309a-2def-11e8-8688-e053ba58f1e4\\_story.html?utm\\_term=.99af931845cc](https://www.washingtonpost.com/opinions/why-conservative-christians-stick-with-trump/2018/03/23/2766309a-2def-11e8-8688-e053ba58f1e4_story.html?utm_term=.99af931845cc) [<https://perma.cc/48MD-ESR7>] (describing Trump's support for Christian conservatives); Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 17, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/UZ2T-X5GR>] (describing the influence of the Federalist Society on Trump's judicial appointments).

55. See Stephen Skowronek, *Is Donald Trump the Great Disrupter? Probably Not.*, WASH. POST (Apr. 24, 2017), [https://www.washingtonpost.com/opinions/is-donald-trump-the-great-disrupter-probably-not/2017/04/24/99c86938-25d9-11e7-bb9d-8cd6118e1409\\_story.html?utm\\_term=.b8ef7a0f0915](https://www.washingtonpost.com/opinions/is-donald-trump-the-great-disrupter-probably-not/2017/04/24/99c86938-25d9-11e7-bb9d-8cd6118e1409_story.html?utm_term=.b8ef7a0f0915) [<https://perma.cc/6WV6-27MS>] (arguing that Trump is not a reconstructive President).

56. John Wagner & Juliet Eilperin, *Once a Populist, Trump Governs Like a Conservative Republican*, WASH. POST (Dec. 6, 2017), [https://www.washingtonpost.com/politics/once-a-populist-trump-governs-like-a-conservative-republican/2017/12/05/e73c6106-d902-11e7-b1a8-62589434a581\\_story.html?utm\\_term=.79caf19edeb7](https://www.washingtonpost.com/politics/once-a-populist-trump-governs-like-a-conservative-republican/2017/12/05/e73c6106-d902-11e7-b1a8-62589434a581_story.html?utm_term=.79caf19edeb7) [<https://perma.cc/SK8D-94KG>].

57. On Obama's preemptive presidency, see Balkin, *supra* note 23. Skowronek has argued that in addition to the cycle of regimes, there is a long-term secular trend towards an ever-greater thickening of institutions; this makes it increasingly difficult for Presidents to shatter old ways of doing things and become fully reconstructive leaders. See SKOWRONEK, *THE POLITICS PRESIDENTS MAKE*, *supra* note 21, at 55–58, 442–44. He calls this long-term secular trend the “waning of political time.” *Id.* at 407, 442–44. At some point, Skowronek suggests, institutions and interest groups will be so powerful that a new reconstructive politics will be impossible. Instead, Presidents will be locked into a politics of “perpetual preemption.” *Id.* at 442–44. Successive Presidents will try to maneuver through the existing thicket of political obstacles, but they will not be able to demolish them to build anew. Skowronek sees signs of the thickening of political time in Ronald Reagan's failure to dismantle the New Deal. *Id.* at 427–28; see also SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME*, *supra* note 21, at 181–86 (arguing that the age of transformative presidencies is over); Stephen Skowronek, *Twentieth-Century Remedies*, 94 B.U. L. REV. 795 (2014) (same).

Could Trump be the first President who faces such a politics of permanent preemption?

Trump might well be an affiliated President like George W. Bush. As noted above, after his election, Trump and his appointees have acted like very conservative Republicans on a wide range of issues. On the other hand, Trump has departed from Republican orthodoxy in several ways: his rejection of free trade, his defense of middle-class entitlements such as Social Security and Medicare, and his repeated calls for huge public works and infrastructure projects. During the campaign Trump also criticized George W. Bush's hawkish foreign policy, distanced himself from the Iraq War, and even blamed Bush for failing to prevent the 9/11 attacks.<sup>58</sup>

Trump's opposition to free trade and his draconian rhetoric on immigration suggest that although he is not abandoning the regime's commitments to deregulatory capitalism, low taxes, and the culture wars, he is trying to renovate and repair the regime. He is adapting it to a changing Republican base of white, working class voters, especially those without college degrees.

Trump, in other words, seems to be trying to give the Reagan regime a new lease on life, or a new shot of legitimacy, by pushing it in a strongly populist and nativist direction.<sup>59</sup> And he is offering himself as a nonideological outsider who has the special talents to fix things. According to Skowronek's model, this style of leadership makes him most like a disjunctive President. As Skowronek puts it:

[O]ne of the great ironies of the politics of disjunction is that the Presidents who come to office in these sorts of situations tend to have only the most tenuous relationship to the establishments they represent. Long-festering problems within the regime tend to throw up leaders only nominally affiliated with it, and in their efforts to address the issues of the day, these affiliates often press major departures of their own from the standard formulas and priorities set in the old agenda. The political effect of these departures is disjunctive: they sever the political moorings of the old regime and cast it adrift without anchor or orientation.<sup>60</sup>

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This does not seem to be the best diagnosis because Trump does not appear to fit the preemptive mold, bobbing and weaving within institutions that constrain him. He does not appear to have embraced the pragmatic, triangulating approach of Eisenhower, Nixon, Clinton, or Obama. Quite the contrary: he seems to have moved sharply to the right, reshaped political norms of appropriate behavior, and achieved a rare degree of loyalty from the members of his own party; the last is something that preemptive Presidents rarely achieve.

58. Katie Glueck, *Trump Blames George W. Bush for 9/11*, POLITICO (Feb. 13, 2016), <https://www.politico.com/blogs/south-carolina-primary-2016-live-updates-and-results/2016/02/gop-debate-2016-trump-911-219260> [https://perma.cc/GVV2-CGEB] (describing Trump's criticisms of George W. Bush during the 2016 campaign); see also Bernie Becker, *Trump's 6 Populist Positions*, POLITICO (Feb. 13, 2016), <https://www.politico.com/story/2016/02/donald-trump-working-class-voters-219231> [https://perma.cc/3HW2-BCWM] (describing Trump's departures from Republican orthodoxy during the 2016 campaign).

59. See Jack M. Balkin, *What Kind of President Will Trump Become?, Part II—Donald Trump and the Politics of Disjunction*, BALKINIZATION (Nov. 14, 2016, 6:30 AM), <https://balkin.blogspot.com/2016/11/what-kind-of-President-will-trump.html> [https://perma.cc/K2TS-DXFR].

60. SKOWRONEK, THE POLITICS THAT PRESIDENTS MAKE, *supra* note 21, at 40.

This description seems to fit Trump quite well.

Trump fits the disjunctive pattern in a second way. As differences within the coalition become increasingly obvious and difficult to manage, disjunctive candidates argue that they are able to fix things because they have special technical abilities. For example, they might portray themselves as extremely skilled politicians (John Quincy Adams, James Buchanan), outstanding technocrats and problem solvers (Herbert Hoover, Jimmy Carter); or, as in Trump's case, outstanding deal makers.<sup>61</sup> They explain to the public that what is important is not ideological purity but the ability to get things done. As Skowronek puts it, in the last days of a regime, mastery of technique—in this case dealmaking and business acumen—“is a hallmark of the politics of disjunction.”<sup>62</sup> Focusing on technique allows the new President to remain ambiguous about his or her positions, allowing everyone in the coalition to believe that it will get what it wants.

We won't really know if Trump is a disjunctive President until he leaves office. But many of the signs are present. And when we combine Skowronek's account of Presidential leadership with the other pieces of evidence identified above, there is a very good chance that Trump does not represent the beginning of a new politics in America but the end of an older one.<sup>63</sup>

### III. THE CYCLE OF POLARIZATION

President Trump, as I have just argued, is a symptom of the decadence of the Reagan regime. But Trump is also a symptom of another political phenomenon, which brings me to the second of the three cycles of constitutional time that I'm interested in—the cycle of polarization and depolarization.

American politics features very long cycles of polarization and depolarization between the political parties.<sup>64</sup> As you might expect, political polarization peaks just around the time of the Civil War. Things stay pretty polarized for a long time. Until late in the nineteenth century, for example, Republicans ran political campaigns by “waiving the bloody shirt”—reminding voters that the Democrats were the party of secession and slavery and therefore could not be trusted to govern.<sup>65</sup> Right around the beginning of the twentieth century, polarization begins

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61. Balkin, *supra* note 59.

62. SKOWRONEK, THE POLITICS THAT PRESIDENTS MAKE, *supra* note 21, at 40; *see also* Richard Kreitner, *What Time Is It? Here's What the 2016 Election Tells Us About Obama, Trump, and What Comes Next*, NATION (Nov. 22, 2016), <https://www.thenation.com/article/what-time-is-it-heres-what-the-2016-election-tells-us-about-obama-trump-and-what-comes-next> [<https://perma.cc/5Y2G-4EML>] (interview with Skowronek explaining why Trump is unlikely to be a reconstructive President and may be disjunctive).

63. For other assessments arguing that Trump is a disjunctive President, see Julia Azari, *Trump's Presidency Signals the End of the Reagan Era*, VOX (Dec. 1, 2016, 10:10 AM), <https://www.vox.com/mischiefs-of-faction/2016/12/1/13794680/trump-presidency-reagan-era-end> [<https://perma.cc/ANM7-Z2A3>]; Corey Robin, *The Politics Trump Makes*, N+1 (Jan. 11, 2017), <https://nplusonemag.com/online-only/online-only/the-politics-trump-makes> [<https://perma.cc/PZ5P-PSVE>].

64. Balkin, *supra* note 11, at 1190.

65. RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING

to recede, and it continues to decline rapidly until the New Deal era.<sup>66</sup> The New Deal/Civil Rights regime features a largely depolarized politics. In fact, during this period there are effectively three different parties: Northern Democrats, Southern Democrats, and Republicans.<sup>67</sup> These three large coalitions have cross-cutting interests that make a wide array of legislative solutions possible. This is the political configuration that produces Social Security and the Fair Labor Standards Act during the New Deal, but it also produces the great civil rights acts of the 1960s, which are bipartisan projects of Northern Democrats and moderate to liberal Republicans.<sup>68</sup>

The civil rights reforms coincided with a transformation of Southern politics. Following World War II, and especially after the Voting Rights Act of 1965, the South gradually evolved from an apartheid region with one-party politics into a region more like the rest of the country, with two competitive political parties.<sup>69</sup> But the civil rights reforms had an undesired side effect. They precipitated realignment between the two parties, as white Southerners flocked to the Republican Party and the two parties began to repolarize, especially around race and cultural issues.<sup>70</sup>

Polarization became a project of the Republican Party during the 1990s. Newt Gingrich saw it as the best way for Republicans to become a majority party that could not only win Presidential elections (as Nixon and Reagan had) but could also control Congress and state governments. Gingrich perfected a new slash-and-burn style of rhetoric that portrayed his political enemies as sexually deviant, dangerous, and unpatriotic.<sup>71</sup> The conservative movement created counter-institutions to promote conservative ideas, and conservative media—talk radio and Fox News being the most obvious examples—helped make political polarization a viable political strategy.<sup>72</sup> The result was asymmetric polarization. Democrats moved a little to the left, in part because conservative Southern Democrats gradually left the party, while the Republican base moved far to the right.<sup>73</sup>

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RECONSTRUCTION AND THE GILDED AGE, 1865–1896, at 67, 211, 327, 337, 403 (2017) (describing the Republican strategy of “waving the bloody shirt”).

66. Balkin, *supra* note 11, at 1189–90.

67. 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. *Id.* at 34–35.

68. *Id.* at 53–57.

69. *Id.* at 132–39.

70. *Id.* at 139–40.

71. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 146–51 (2018) (describing Gingrich’s strategy of demonizing his political allies); MANN & ORNSTEIN, *supra* note 37, at 35–39 (same).

72. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 135–80 (2008) (describing how funders helped shape the conservative legal movement); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 951–56 (2018) (describing creation of conservative counter-institutions).

73. MANN & ORNSTEIN, *supra* note 37, 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).

Increasing polarization destroyed the system of compromise politics that characterized the New Deal/Civil Rights era. Conservative Democrats and liberal Republicans became increasingly rare to virtually nonexistent.<sup>74</sup> Unsurprisingly, because there was little overlap between the positions of members of the two parties, political compromise became increasingly difficult. Obstruction is a predictable result when there is no middle ground. Today there is a de facto rule that it takes sixty votes in the Senate to pass any important legislation because the party opposite the President will filibuster if they don't already control the majority. This phenomenon is relatively recent. It is a product of the 1990s, developed as a strategy of obstruction.<sup>75</sup>

One might have hoped that the disputed election of 2000 would have led the George W. Bush administration to attempt to mend political fences and work to tamp down the forces of polarization. Bush, who had cooperated with Democrats as Governor of Texas, had sought to portray himself as “a uniter, not a divider.”<sup>76</sup> A further opportunity for unity came after the September 11, 2001 terrorist attacks. But the forces of polarization were far too strong and, more to the point, far too tempting for politicians seeking short-term electoral gains. The Bush administration's chief political strategist, Karl Rove, recognized that Republicans were more likely to win national elections if they appealed to their base of loyal voters and got them out to vote in large numbers.<sup>77</sup> Such a base strategy encourages deliberately polarizing the electorate so that the base will be energized to turn out—because they come to believe that the other party can't be trusted to govern.

The problem with the rhetoric and strategy of polarization is that it is good for getting elected but not particularly good for governing, unless, of course, one can gain a sixty-vote majority in the Senate, a working majority in the House, and control of the Presidency. The strategy of polarization helped Republicans become the dominant party during the Reagan regime,<sup>78</sup> but it had unfortunate effects—another example of how the path of victory for a dominant party in a political regime may contribute to its undoing later on.

Polarization and obstruction make it more difficult for Congress to reach compromises. For a time this meshed well with an ideological message that

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74. Frank Newport, *Conservative Democrats, Liberal Republicans Hard to Find*, GALLUP (Sept. 2, 2009), <https://news.gallup.com/poll/122672/conservative-democrats-liberal-republicans-hard-to-find.aspx> [<https://perma.cc/E2SB-78SC>].

75. LEVITSKY & ZIBLATT, *supra* note 71, at 145–75 (describing the Republican strategy of obstruction and polarization from the 1990s onward); MANN & ORNSTEIN, *supra* note 37, at 55, 84–90 (same).

76. Doyle McManus, *Bush's Vow To Unite Encounters a Great Divide*, L.A. TIMES (Dec. 14, 2000), <http://articles.latimes.com/2000/dec/14/news/mn-65530> [<https://perma.cc/WM63-B97J>].

77. *Karl Rove—The Architect*, PBS: FRONTLINE (Apr. 12, 2015), <https://www.pbs.org/wgbh/pages/frontline/shows/architect/rove/2004.html> [<https://perma.cc/4PL6-ALR8>].

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

government is incompetent and therefore we should have smaller government and less regulation. But it made governing difficult when Republicans were in power. Polarization also helped encourage the rise of increasingly radical factions within the party who valued ideological purity over compromise and obstruction over legislative success.<sup>79</sup>

A gridlocked Congress also encourages Presidents to assert ever greater authority in governing, both in foreign policy and through creative uses of the administrative state.<sup>80</sup> An expansive conception of executive power and unilateral Presidential action might have been fine when Republicans controlled the White House, but it created an opening for Democrats like Barack Obama to use similar strategies to push for immigration and environmental reforms. As a result, conservative Republicans have become increasingly critical of the executive's control of the administrative state.<sup>81</sup> This is a reverse of the conservative stance at the beginning of the Reagan era, when conservatives wanted the President to take greater control of the bureaucracy, and they developed the constitutional theory of the unitary executive and promoted the theory of *Chevron* deference.<sup>82</sup>

The final irony of the strategy of polarization and obstructionism was that when Republicans finally gained control of all three branches of government in 2017, they were unable to repeal Obamacare. Because Democrats could filibuster legislation when Republicans had less than sixty votes in the Senate, Republicans had to use complex reconciliation rules to repeal Obamacare by a simple majority. This greatly limited the kinds of reforms they could adopt; these limitations and the budgetary constraints of the reconciliation rules created divisions within their own coalition, ultimately dooming the repeal.

Polarization and obstruction have also led to an unwieldy form of governance. Congress no longer uses its ordinary appropriations process. Instead of a series of bills passed through the committee system, party leaders negotiate with each other for grand omnibus appropriations bills that are packed with multiple policy riders, conditions, and subsidies.<sup>83</sup> These bills keep the government running until the next deadline, at which point party leaders negotiate under time pressure to produce a new grand appropriations measure, which leaders then present to Congress without much deliberation, essentially on a take-it-or-leave-it basis. This policy of legislative brinksmanship—lurching from big appropriations bill to big

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79. *Id.*; see also MATT GROSSMANN & DAVID A. HOPKINS, *ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS* (2016) (arguing that Republican voters reward candidates who value ideological purity and refuse to compromise).

As the country polarized, Republicans also led the way by engaging in more and more constitutional hardball, straining and breaking existing conventions of mutual tolerance and institutional forbearance for partisan advantage. See Fishkin & Pozen, *supra* note 72 (describing Republicans' increasing use of constitutional hardball).

80. Balkin, *supra* note 11, at 1193–94.

81. See Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

82. See Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009).

83. See SHAFER, *supra* note 67, at 173–74.

appropriations bill—is the only way that congressional leaders can transcend the bitter polarization and political dysfunction characteristic of the late Reagan regime.<sup>84</sup> It keeps the government running, but it precludes serious policy deliberation, much less any sustained attempt to deal with serious public problems.

#### IV. CONSTITUTIONAL CRISIS

So far I have talked about the cycle of regimes and the cycle of polarization. The third cycle of constitutional time is the cycle of rot and renewal. But in order to explain this cycle, I need to introduce another key idea. This is the idea of constitutional crisis.<sup>85</sup>

One of the most common claims by journalists and commentators during the Trump administration has been that America is in the middle of a constitutional crisis, or that if a certain thing happens—for example, if Trump fires Special Prosecutor Robert Mueller—we will be hurled into a constitutional crisis. People said this after the first travel ban was announced;<sup>86</sup> they said it again when President Trump fired FBI Director James Comey;<sup>87</sup> they have announced the imminent arrival of a constitutional crisis on any number of occasions since then.<sup>88</sup>

But at least as of this writing—the summer of 2018—the United States is not in a constitutional crisis. Let me explain what a constitutional crisis is, and why we are not in the middle of one.

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84. *Id.* (arguing that period of gridlock leading to crises followed by omnibus bills characterizes the “Era of Partisan Volatility”).

85. See Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009).

86. See, e.g., Jessica Schulberg & Sam Levine, *Trump Inches the U.S. Closer to Constitutional Crisis*, HUFFPOST (Feb. 4, 2017, 5:21 PM) [http://www.huffingtonpost.com/entry/trump-constitutional-crisis-judge-robart\\_us\\_58964292e4b09bd304bba74f](http://www.huffingtonpost.com/entry/trump-constitutional-crisis-judge-robart_us_58964292e4b09bd304bba74f) [<https://perma.cc/U8SU-Q8DV>] (quoting Senator Patrick Leahy’s statement that President Trump “seems intent on precipitating a constitutional crisis”).

87. See, e.g., David Cole, *Trump’s Constitutional Crisis*, N.Y. REV. BOOKS (May 10, 2017, 6:16 PM), <http://www.nybooks.com/daily/2017/05/10/trumps-constitutional-crisis-james-comey/> [<https://perma.cc/97RN-87PZ>] (“This is a constitutional crisis.”); Alexandra Wilts, *Comey Fired: America Is Witnessing a Constitutional Crisis, Says Leading Democrat*, INDEP. (May 10, 2017, 3:23), <http://www.independent.co.uk/news/world/americas/us-politics/james-comey-fired-donald-trump-constitutional-crisis-fbi-director-russian-investigation-latest-news-a7727341.html> [<https://perma.cc/4F5G-LD3A>] (quoting Representative Keith Ellison’s remark that “[w]e are witnessing a constitutional crisis unfold before our very eyes”).

88. Jonathan Chait, *The Constitutional Crisis Is Already Underway*, N.Y. MAG.: DAILY INTELLIGENCER (June 2, 2018), <http://nymag.com/daily/intelligencer/2018/06/the-constitutional-crisis-is-already-underway.html> [<https://perma.cc/8Q86-2YC2>]; Robert Reich, *We’re Living a Constitutional Crisis*, AM. PROSPECT (July 24, 2018), <http://prospect.org/article/were-living-constitutional-crisis> [<https://perma.cc/YAJ4-GPBM>]; Eugene Robinson, *The Constitutional Crisis Is Here*, WASH. POST (May 21, 2018), [https://www.washingtonpost.com/opinions/the-constitutional-crisis-is-here/2018/05/21/deaf19b2-5d27-11e8-a4a4-c070ef53f315\\_story.html?utm\\_term=.854f7f8a567e](https://www.washingtonpost.com/opinions/the-constitutional-crisis-is-here/2018/05/21/deaf19b2-5d27-11e8-a4a4-c070ef53f315_story.html?utm_term=.854f7f8a567e) [<https://perma.cc/L4FM-37MS>].

Constitutions do many things—they protect rights, and they distribute powers and duties. But above all, a constitution is a device for making politics possible—politics, that is, as opposed to violence, insurrection, and civil war. The central point of a constitution is to channel people’s disagreements and struggles for power into a system of law and political procedures so that these disagreements and struggles for power do not break down or break out into violence, civil war, or insurrection.<sup>89</sup> We can therefore say that a constitution is achieving its central function when it can cabin the desire for power—and the desire for dominance, which is always present in human affairs—into political struggles within the constitutional system.

A constitution fails when it is unable to perform that central task. And this can happen in one of three ways.

First, at some point, political officials, most importantly the President, can simply announce that they will no longer abide by the rules of the Constitution.<sup>90</sup> Political leaders—or military leaders—might argue that things have gotten so bad and the country has strayed so far off course that they can no longer possibly stay within the boundaries of the Constitution. We have to save the country, they will exclaim; we must deal with internal or external enemies and threats, and therefore we must—perhaps temporarily—stop following the Constitution. A constitutional crisis of the first type might also occur if political leaders refuse to obey a judicial order directed to them. That would undermine a central feature of constitutional government. For officials to say that they won’t abide by the Constitution or direct judicial orders precipitates a constitutional crisis, because officials refuse to abide by the very device that keeps struggles for power and authority inside politics and within the basic law of the Constitution.

The second kind of crisis occurs when everybody thinks that they are following the Constitution, and the result is disaster.<sup>91</sup> For example, the Constitution might demand that leaders do something—or not do something—in a way that leads directly to disaster. Or people may believe that the Constitution does not provide for a certain event so that everyone is paralyzed and disaster strikes. In this second type of crisis, everyone goes off the cliff together, like a bunch of lemmings. If the first type of crisis is a crisis of constitutional disobedience, we might think of the second type as a crisis of excessive constitutional fidelity—or, more correctly, a crisis of fidelity produced by a total lack of constitutional imagination and innovation. This last point explains why this second sort of crisis almost never happens. When people find themselves in a predicament—for example, they don’t know what the Constitution requires—they will usually be able to reinterpret the Constitution to get out of the predicament.<sup>92</sup> That doesn’t mean that everyone will agree on the interpretive solution. But it does mean that the difficulty turns into a dispute about constitutional interpretation that can be resolved within the constitutional system.

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89. Levinson & Balkin, *supra* note 85, at 711, 714–15.

90. *Id.* at 714, 721–29 (describing “type one” crises).

91. *Id.* at 714, 729–38 (describing “type two” crises).

92. *Id.* at 729–31 (giving the example of President Abraham Lincoln taking a different view of the power to respond to rebellion than his predecessor, President James Buchanan).



The third type of crisis is closest to what people usually think of when they talk about a constitutional crisis. This crisis occurs when people disagree about what the Constitution means, and they disagree so strongly that they do not simply confine themselves to legislative votes and litigation, or to op-eds, tweets, press conferences, and protests.<sup>93</sup> Instead, they take to the streets and riot. They engage in violence. They engage in secession. Or they engage in civil war.<sup>94</sup> Now *that's* a constitutional crisis. The Constitution has failed to keep political struggle within its proper boundaries—that is to say, within the boundaries of political competition set by the Constitution.

Constitutional crisis, in other words, means reaching a point in which the Constitution is about to fail, or has already failed, at its central task—of making politics possible. The U.S. Constitution has been remarkably durable. There have been countless times during our history in which political officials have disobeyed the law—just think about the many times each year that local governments, states, and the federal government get sued—but these legal violations are not by themselves constitutional crises. There have been a small number of genuine crises in which the Constitution was on the verge of failure. But the Constitution has only broken down as a system of politics once in our history. That failure occurred during the Civil War. The Constitution failed because Americans were unable to keep the disputes that led to the Civil War within politics, and instead, the situation degenerated into violence and rebellion.

*Political* crises abound in American history—the Watergate scandals and the Clinton impeachment are good examples—but they usually are resolved within the constitutional order. And, as noted above, government officials often violate the law—that's why we have a system of courts. Real constitutional crises, on the other hand, are very rare. Even political crises that veer on the edge of a genuine constitutional crisis are rare.<sup>95</sup>

Generally speaking, we almost never face the first kind of crisis—in which the President or other leaders announce that they will not abide by the Constitution or obey direct judicial orders. One reason for that is that lawyers are usually able to come up with creative interpretations so that politicians can assert that they are being faithful to the Constitution, so the conflict resolves to a conflict over interpretation that is settled either in the courts or through the give and take of ordinary politics.<sup>96</sup>

The second kind of crisis is also very rare, and for much the same reason. Americans are very clever at interpreting the Constitution, so if lawyers and politicians come across a problem that they initially think can't be solved, or for

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93. *Id.* at 714, 738–46 (describing “type three” crises).

94. *Id.*

95. *Cf.* Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579, 590 (2008) (“[M]any so-called ‘constitutional crises’ are not real crises at all, but rather heated disagreements about the Constitution in which people fear (whether reasonably or unreasonably) that the system will spin out of control . . .”).

96. Levinson & Balkin, *supra* note 85, at 722–23 (noting that American Presidents have never asserted prerogative powers to act outside the Constitution; instead they offer controversial interpretations that justify their actions).

which the Constitution appears to provide no solution, they will simply work at reinterpreting the Constitution until they think they have solved the problem.

The third kind of crisis is also very rare. The Civil War is the central example. People often disagree heatedly about what the Constitution means. But they usually turn to the courts to settle the question, or else the issue is resolved through politics. The point of a constitution is not to prevent disagreement and dispute; it is to channel disagreement and dispute into peaceful solutions within law and politics. That does not mean that disputes are always resolved correctly or justly. It merely means that disputes are settled within the constitutional system. Avoiding constitutional crisis is not the same thing as securing justice. One can have a great deal of injustice in a constitutional system without precipitating a constitutional crisis. In fact, one might note ruefully that injustice has often been the price of political stability in the United States. The American Constitution has been read to allow a great deal of injustice during its 230 or so years of existence. But it has faced few constitutional breakdowns.

Armed with this analysis of constitutional crisis, we can see that none of the things that people have complained about are genuine constitutional crises. When President Trump issued the first version of the travel ban and there was chaos at American airports, people said it was a constitutional crisis.<sup>97</sup> It wasn't. Rather, what happened is that the administration litigated the constitutionality of the travel ban (and its successors) in the federal courts.<sup>98</sup> That is how we are supposed to resolve constitutional disputes. Again, some people worried that firing FBI Director James Comey constituted a constitutional crisis, and other people worry that if President Trump dismisses Special Prosecutor Robert Mueller, that would be a constitutional crisis.<sup>99</sup> Neither of these things is the case. The President has the legal power to fire the FBI director,<sup>100</sup> and he also has the power to order officials in the Justice Department to dismiss the special prosecutor with cause.<sup>101</sup> To be

97. See, e.g., Schulberg & Levine, *supra* note 86.

98. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (describing the course of the litigation from Trump's first executive order through his third executive order, upheld by the Supreme Court).

99. See, e.g., Daniel Bush, *Trump Firing Mueller Would 'Create a Constitutional Crisis,' Sen. Warner Says*, PBS: NEWSHOUR (Apr. 19, 2018, 6:45 PM), <https://www.pbs.org/newshour/show/trump-firing-mueller-would-create-a-constitutional-crisis-sen-warner-says> [<https://perma.cc/MW29-TKAG>]; Brandon Carter, *Booker Says Mueller Firing Would Be 'Constitutional Crisis'*, HILL (Jan. 26, 2018, 11:50 AM), <http://thehill.com/homenews/senate/370883-booker-trump-considering-firing-mueller-could-cause-constitutional-crisis> [<https://perma.cc/C6HV-R595>]; Cole, *supra* note 87 (arguing that Comey firing was a crisis); Wilts, *supra* note 87 (same).

100. Constitutionality of Legislation Extending the Term of the FBI Director, 35 Op. O.L.C. 1, 3 (June 20, 2011) (“[T]he FBI Director is removable at the will of the President. . . . No statute purports to restrict the President’s power to remove the Director.”), [https://www.justice.gov/sites/default/files/olc/opinions/2011/06/31/fbi-director-term\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2011/06/31/fbi-director-term_0.pdf) [<https://perma.cc/5PVF-9H4P>]; Robert Chesney, *Backgrounder: The Power to Appoint & Remove the FBI Director*, LAWFARE (May 10, 2017, 11:55 AM), <https://www.lawfareblog.com/backgrounder-power-appoint-remove-fbi-director> [<https://perma.cc/2GXD-HBTP>] (“Congress at no point has attempted to constrain the President’s removal power.”).

101. 28 C.F.R. § 600.7(d) (2017) (“The Special Counsel may be disciplined or removed

sure, firing Mueller would precipitate a *political* crisis—just as President Nixon’s firing of Archibald Cox precipitated a political crisis that ultimately led to Nixon’s impeachment a year later. But a political crisis resolved through the courts and through constitutional processes of impeachment and removal is not a constitutional crisis.<sup>102</sup>

A related concern is the fear that the President will refuse a subpoena by Special Prosecutor Mueller.<sup>103</sup> If he litigates the question, there is no constitutional crisis. If the Supreme Court issues a direct order to the President, and he refuses to obey, that would be a constitutional crisis. This is what people feared would happen in the Watergate scandal: they feared that President Nixon would refuse to obey a subpoena ordering him to surrender the Watergate tapes.<sup>104</sup> But Nixon complied with the Supreme Court’s order, and so there was no constitutional crisis. On the other hand, if Nixon had said, “I’m not going to give up the tapes, and I’m going to burn them on the White House lawn,” that would have been a constitutional crisis.<sup>105</sup>

Here I will add an important qualification. Constitutional crisis doesn’t have to refer only to the actual moment of constitutional failure. It might also refer to a period in which the possibility of constitutional failure is real and palpable.<sup>106</sup> The best analogy would be to a medical crisis, in which a patient’s condition hovers between life and death. One might therefore argue that if there is a serious probability that the President will announce that he will discard constitutional limits or will refuse to obey a direct judicial order—that period of uncertainty is a constitutional crisis, even if the President ultimately backs away. Thus, if one believed that Nixon was planning to spurn the Supreme Court’s order to surrender the Watergate tapes in 1974, one would be justified in saying that the country was on the brink of a constitutional crisis.

Therefore, if people reasonably believe that President Trump is about to jettison the Constitution or defy the courts, it is fair to say that this is a period of

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from office only by the personal action of the Attorney General. The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.”).

102. Cf. Levinson & Balkin, *supra* note 85, at 714 (“Disagreement and conflict are natural features of politics. The goal of constitutions is to manage them within acceptable boundaries.”).

103. See, e.g., Paul Rosenzweig, *What Would Actually Happen if Trump Refused a Subpoena?*, ATLANTIC (May 26, 2018), <https://www.theatlantic.com/politics/archive/2018/05/trump-mueller-russia-subpoena/560981> [<https://perma.cc/LC6M-C3VA>] (“[M]any would call the President’s refusal to obey a court’s lawful order a ‘constitutional crisis,’ and that’s probably accurate.”).

104. Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921> [<https://perma.cc/E5BB-S5HB>] (“Though many worried that Nixon would disobey the Supreme Court in 1974 when it ordered him to turn over his incriminating tapes to a special prosecutor, Nixon famously acquiesced.”).

105. Levinson & Balkin, *supra* note 85, at 742 (arguing that failure to comply with an order from the Supreme Court would have precipitated a “type one” crisis).

106. Cf. *id.* at 745 (“People may have regarded Watergate, the 2000 election, and the *Steel Seizure Case* as crises not because they were crises in the sense we describe, but because they feared that they would become that sort of crisis.”).

constitutional crisis as well as a period of political crisis. (Imagine, for example, that the President is duly impeached and removed from office, but refuses to leave and calls on the military to support him.) But this has not yet happened. The Trump administration has repeatedly fought out its disputes about the Constitution in the courts of law and the court of public opinion.

I therefore conclude that we are not in a constitutional crisis at present in the United States, although we can expect many moments of political crisis in the next several years. I do not say that we will never be in a moment of constitutional crisis—merely that this is not our present situation. Many people worry that we are on the brink of such a constitutional crisis. They worry that, any day now, the President is going to tweet: “That was a nice Constitution you had there, but it’s over. Sad!” But no matter how outrageous some of his public statements have been, he has not crossed that particular Rubicon. Let us hope he never does.

Even so, people sense that there is something deeply wrong with American politics, and that is why they are using the language of constitutional crisis—incorrectly, in my view—to describe it. There is, however, a better, more accurate way to describe our current political situation. I turn to that question now. It lies at the heart of the third of the political cycles we are living through.

#### V. THE CYCLE OF CONSTITUTIONAL ROT

We are not living in a period of constitutional crisis. But we are—and have been for some time—been living in a situation of constitutional rot.<sup>107</sup> What is constitutional rot? It is the decay of the features of a constitutional system that maintain it both as a democracy and as a republic.<sup>108</sup> That basic idea has a number of entailments, which I will now try to elaborate.

The word “republic” comes from the Latin *res publica*, a public thing.<sup>109</sup> A republic is more than a representative form of government. It is a joint enterprise by citizens and their representatives to pursue and promote the public good.<sup>110</sup> As I will

107. See Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 13 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018) [hereinafter Balkin, *Constitutional Crisis and Constitutional Rot*]; Jack M. Balkin, *Constitutional Rot*, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA 19 (Cass R. Sunstein ed., 2018) [hereinafter Balkin, *Constitutional Rot*].

108. Balkin, *Constitutional Rot*, *supra* note 107, at 20. John Finn uses the term “constitutional rot” in a somewhat different sense. While I focus on a decline in the twin values of democracy and republicanism, Finn argues that constitutional rot can occur “even . . . when constitutional institutions appear to be in good repair.” JOHN FINN, PEOPLING THE CONSTITUTION 32 (2014). In Finn’s theory, a constitutional system rots when constitutional questions are reduced to purely legal questions, and the public becomes disengaged from the maintenance and defense of constitutional values. *Id.*

109. THOMAS PAINE, RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE’S ATTACK ON THE FRENCH REVOLUTION (1791), reprinted in THOMAS PAINE: COLLECTED WRITINGS 433, 565 (Eric Foner ed., 1995) (“[R]ES-PUBLICA, the public affairs, or the public good; or, literally translated, the *public thing* . . . refer[s] to what ought to be the character and business of government . . .”).

110. See *id.*; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 55–56 (1969); Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94

describe in a moment, republics are delicate institutions, often subject to decay, and both the public and the governing elites are often distracted from their public-spirited purpose. When a republic decays, it loses its connection to the joint pursuit of the public good. Government officials lose their connection to the public good. Then the country becomes an oligarchy or an autocracy.<sup>111</sup>

It is common to think of our current political problems in terms of gridlock. Government can't seem to respond to public problems, or, indeed, get anything of importance done. Congress can barely keep the government funded and running.<sup>112</sup> The diagnosis of gridlock made more sense when there was divided government. But since the 2016 election, the national government hasn't been divided. During the first two years of the Trump Presidency we have had unitary government with Republicans in charge. And yet we still have dysfunction. So although it is undoubtedly true that increasing polarization is part of the problem, something else much deeper is going on. That something else is constitutional rot.

In the past forty years or so, the United States has increasingly become both less democratic and less republican.<sup>113</sup> By less democratic, I mean that it is increasingly unresponsive to popular opinion and popular will. By less republican, I mean that representatives are increasingly less devoted to the public good, rather than to pleasing or paying off a relatively small set of powerful individuals and groups.<sup>114</sup>

Constitutional rot is the process through which a constitutional system becomes less democratic and less republican over time. When we talk of constitutional rot, therefore, we are interested both in failures of democracy—that is, responsiveness to public opinion and public will—and failures of republicanism—that is, public officials' devotion to the public good. When public servants are increasingly diverted into the pursuit of their own wealth, or when they are increasingly diverted into serving the interests of a relatively small number of very powerful individuals, democracy and republicanism decay, and we have constitutional rot. And when public officials are no longer responsive either to public will or to the public good, and instead serve the interests of a small group of powerful and wealthy people, the result is oligarchy—rule by the few.

Constitutional rot has a second dimension: the gradual destruction of political norms of mutual forbearance and fair political competition that make it possible for people who disagree with each other to jointly pursue the public good.<sup>115</sup> Republics

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TEX. L. REV. 1427, 1433 (2016).

111. Balkin, *Constitutional Rot*, *supra* note 107, at 19–20.

112. *See, e.g.*, Pete V. Domenici & Alice M. Rivlin, *Proposal for Improving the Congressional Budget Process*, BROOKINGS (July 17, 2015), <https://www.brookings.edu/research/proposal-for-improving-the-congressional-budget-process> [<https://perma.cc/BWX5-8U7Q>] (“In the face of increasing partisan polarization and frequent gridlock, Congress and the executive branch have lurched from one budget crisis to another and kept the government running by means of continuing resolutions and massive omnibus appropriations bills. They have sought to force themselves to make decisions by resorting to special, sometimes bizarre devices, including the super committee, the fiscal cliff, and sequestration.”).

113. Balkin, *Constitutional Rot*, *supra* note 107, at 19–20.

114. *Id.*

115. For an excellent discussion of the importance of these norms in preserving democratic government, see LEVITSKY & ZIBLATT, *supra* note 71, at 102–17 (2018).

depend on more than mere obedience to the letter of the law. They depend on well-functioning institutions that balance and check power and ambition, and conventions that require government officials to behave in a public-spirited fashion.<sup>116</sup> Republics also depend on mutual toleration and forbearance that makes it possible for contending sides to view each other not as implacable enemies that must be eliminated but as fellow citizens who, despite their differences, all aim at the larger goal of serving the *res publica*.<sup>117</sup>

Some of these norms concern rule of law values. For example, political leaders must not misuse the executive power to punish their political enemies or attempt to imprison them. Others concern electoral integrity: politicians must respect the results of fair elections, and they must not try to rig the electoral system to entrench themselves in power. These and similar norms prevent ambitious politicians from overreaching, entrenching themselves and their ideological allies, and undermining public trust in democracy. When politicians abide by these norms, they help promote cooperation between different political parties and factions, even when opponents strongly disagree about the proper direction of politics. Finally, these norms prevent politicians from privileging short-term political gains over long-term injuries to the health of the constitutional system.

A third dimension of constitutional rot involves the gradual loss of the kinds of trust that are necessary for republics to function properly: trust between members of the public, trust between the public and government officials, and trust among government officials of different parties.<sup>118</sup> For republics to succeed, the public must not view their fellow citizens as incorrigible and implacable enemies. They must trust that government officials will usually exercise power in the public interest and not for their own personal benefit or for the benefit of private interests and cronies. Public officials need to trust that their political opponents will respect fair rules of political competition and will not overreach or manipulate the mechanisms of government to unfairly entrench themselves in power and seek to punish their political enemies.

Norms of mutual forbearance and fair competition ultimately depend on trust. When trust decays, these norms are weakened, producing a vicious cycle. If the public loses trust in public officials, they will become cynical and despairing, and they will turn to demagogues.<sup>119</sup> If public officials cannot trust each other to behave responsibly and fairly, they will refuse to cooperate. As their mutual suspicion grows, they will discard norms of fair competition; they will try to grab as much power as possible and punish their adversaries before their adversaries can lock them out of power and punish them instead. When politicians become beholden to a small set of powerful interests and persons, discard norms of fair political competition, undermine public trust, and repeatedly overreach by using constitutional hardball to rig the system in their favor and keep themselves (or their

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116. *Id.* at 7–8.

117. *Id.* at 102–17.

118. Balkin, *Constitutional Crisis and Constitutional Rot*, *supra* note 107; LEVITSKY & ZIBLATT, *supra* note 71, at 102–17.

119. Balkin, *Constitutional Rot*, *supra* note 107, at 21.

allies) in power, they cause democracy and republicanism to decay.<sup>120</sup> All of these phenomena produce constitutional rot.

#### A. Republican Insurance

The framers of the U.S. Constitution understood that republics are especially susceptible to rot. Many people remember what Benjamin Franklin is supposed to have said when a woman asked him to describe the new Constitution—“A republic, Madam, if you can keep it.”<sup>121</sup> But behind that famous quote is an important story. It sounds as if Franklin is joking when he says, “if you can keep it.” But he wasn’t joking. Near the very end of the Philadelphia convention, just as the framers were about to ship the new Constitution off to the states for ratification, Franklin made an important speech, which appears in Madison’s notes. Franklin told the delegates that the new American government “is likely to be well administered for a course of years, and can only end in Despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic Government, being incapable of any other.”<sup>122</sup>

When Franklin spoke, everyone in the room understood what he was saying. Many of the framers had read the classics of ancient history, and they understood that republics are very difficult to keep going.<sup>123</sup> All republics are susceptible to constitutional rot. All republics eventually become corrupted. And up to that point in history, all republics had eventually fallen, turning into despotisms, tyrannies, or rule by the mob. The framers had read Aristotle and Polybius, and they knew that ancient writers believed that this is how things usually ended up.<sup>124</sup>

Why are republics so difficult to maintain? Because of ambition, because of greed, because of the ever-present lust for power among human beings. The fragility of republics is a consequence of the fragility of human goodness. The people in republics may start out devoted to the public good, but over time they stray, for many reasons—including, ambition, wealth, power, and the urge to dominate others.<sup>125</sup>

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120. See Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 5 (2016) (explaining democratic backsliding as “the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy”); Aziz Huq & Thomas Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018) (describing “democratic retrogression”). On the idea of “constitutional hardball,” see Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

121. WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* 459 (2003).

122. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 642 (Max Farrand ed., rev. ed. 1966).

123. See CARL J. RICHARD, *GREEKS AND ROMANS BEARING GIFTS: HOW THE ANCIENTS INSPIRED THE FOUNDING FATHERS* (2009) (describing the influence of Aristotle, Cicero, Polybius, and other classical authors on the founders).

124. See *id.*; GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 11–12 (2017) (describing the process of corruption of republics).

125. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 210–11 (1997) (arguing that the basic problem of republics is to promote resilience and stability in the face of continual sources of temptation and corruption); WOOD, *supra* note 110, at 105 (“Precisely because republics required civic virtue and disinterestedness among their

The Framers knew that this had happened over and over again in human history. They believed it would eventually happen to the American Constitution. And so they drafted their new constitution with various devices to try to limit the cycle of republican rot, to have things bottom out before the country turned to mob rule, oligarchy, or dictatorship.<sup>126</sup> Their goal, in other words, was to buy time for democracy so that the inevitable periods of constitutional rot would be followed by periods of constitutional renewal.

This way of understanding our constitutional system differs from our usual concern with constitutional doctrine, with principles of limited government, or even with the preservation of liberty. Focusing on constitutional rot is a structural consideration—but a consideration connected to the belief that history operates in cycles of rot and renewal. Many of the Constitution’s structural features—federalism, separation of powers, checks and balances, an independent judiciary, staggered elections for the two Houses of Congress and the President, fixed terms for the executive—may be understood not only in terms of limits on government power, but also in terms of the dangers of constitutional rot. These structural features operate to dampen and limit the downside of inevitable decay in our republican institutions—to keep democracy afloat and republicanism running until the political system has a chance to renew and right itself. The goal is to ensure that although things may get bad at various points in time, the republic never completely falls apart, so that it can bottom out and renew itself eventually. Separation of powers, federalism, an independent judiciary, and staggered election cycles help guarantee that there is always a locus of opposition, a political space in which oppositional groups can safely form, in which pressures for reform can gain strength and are not completely snuffed out or shut out of power. So too, an independent judiciary helps ensure that federal judges aren’t simply under the thumb of a charismatic leader.

If one looks at the Constitution this way, it is not merely a blueprint for liberty, it is also an insurance policy for republics.<sup>127</sup> Republics are at the mercy of time. They will get better and worse. They will get more public spirited and less public spirited. They will decay and they will renew themselves. Sometimes the people we elect will be very good people, sometimes they will be venal and incompetent. Sometimes they will be thoroughly corrupt. The country will cycle through decades of ebb and flow, renewal and decline. But the central point of a Constitution like

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citizens, they were very fragile polities, extremely liable to corruption.”); Balkin, *supra* note 110, at 1444 (“[T]ime is the great enemy of republics, because as time goes on and circumstances change, corruption finds ever-new ways of entering the system, weakening the institutions and practices that ensure republican government.”).

126. See JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 61 (1979) (“The possibility of a national demagogue was one of the greatest fears of the Founders and literally frames *The Federalist*, being mentioned in both the first and last numbers.”); Zephyr Teachout, *The Anti-Corruption Principle*, 94 *CORNELL L. REV.* 341, 352 (2009) (“The Constitution was intended to provide structural encouragements to keep the logic and language of society as a whole from becoming corrupt, representing a technical and moral response to what they saw as a technical and moral problem.”).

127. Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 *IND. L. REV.* 281 (2016).



America's is to create a system that, even if ungainly in the best of times, can buffer itself against the worst of times.

There is a price to pay for these fail-safes, these forms of republican insurance. The most important price is that our constitutional system has many veto points that prevent it from being fully democratic. It is not very efficient in responding to popular will even in the best of times. That may lead to public frustration. But the ability of opponents to resist and derail change is the political price, the premium, if you will, that Americans pay for republican insurance. If you believe, as the Framers did, that rot and decay in republics are inevitable, that premium is probably well worth paying. Nothing is more certain than that American politics will go through periods of rot and decay, and that Americans will go through a cycle of corruption, cynicism, and despair. It has happened before. It is happening now.

### *B. The Four Horsemen of Constitutional Rot*

Many factors have contributed to our present case of constitutional rot. They include the gradual breakdown in the party system; changes in how campaigns are financed; and the enormous power of dark money in deciding who gets elected, and in influencing what people do once they obtain office.<sup>128</sup>

Another important set of causes concern long-term changes in the structure of mass media, which have encouraged polarization and political distrust, and hastened the merger of politics with entertainment.<sup>129</sup> After all, we now have a reality TV star as President.

These changes in the structure of media have made the public more susceptible to propaganda, a term I use advisedly. Propaganda was an important tool for maintaining political power in the former Soviet Union. The United States is now flush with propaganda of the sort that would have done the Soviets proud. Some of this propaganda comes from outside the country,<sup>130</sup> but a lot of the propaganda comes from inside the country.<sup>131</sup> And whatever its source, it is having serious effects on American democracy.

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128. See Balkin, *Constitutional Rot*, *supra* note 107, at 21–23.

129. *Id.* at 21.

130. *Id.* at 25; TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA* (2018) (arguing that Russia employs propaganda strategies and tactics it had previously used on its own people to disrupt liberal democracies in Europe and the United States); Nicholas Confessore & Daisuke Wakabayashi, *How Russia Harvested American Rage to Reshape U.S. Politics*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/technology/russia-election-facebook-ads-rage.html> [<https://perma.cc/KMF7-F58K>].

131. Balkin, *Constitutional Rot*, *supra* note 107, at 21; KELLY BORN & NELL EDGINGTON, HEWLETT FOUND., *ANALYSIS OF PHILANTHROPIC OPPORTUNITIES TO MITIGATE THE DISINFORMATION/PROPAGANDA PROBLEM 7–17* (2017), <https://hewlett.org/wp-content/uploads/2017/11/Hewlett-Disinformation-Propaganda-Report.pdf> [<https://perma.cc/UUN7-PJYR>]; ROBERT FARIS, HAL ROBERTS, BRUCE ETLING, NIKKI BOURASSA, ETHAN ZUCKERMAN & YOCHAI BENKLER, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y, *PARTISANSHIP, PROPAGANDA, & DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION 25–31* (2017), [https://dash.harvard.edu/bitstream/handle/1/33759251/2017-08\\_electionReport\\_0.pdf?sequence=9&isAllowed=y](https://dash.harvard.edu/bitstream/handle/1/33759251/2017-08_electionReport_0.pdf?sequence=9&isAllowed=y) [<https://perma.cc>

Propaganda is more than false information. It is designed to confuse and divide people.<sup>132</sup> It sets people at each other's throats and makes it difficult for people to know what is true and what is false. As a result, people simply come to believe that no one and nothing can be trusted. This causes them to rely on their existing prejudices and to root ever more strongly for their political team. Propaganda discourages rational thought about policy and encourages emotional identification with one's tribe.<sup>133</sup> Thus, by blurring the line between the true and the false, and by making it difficult to know what is true and false, effective propaganda encourages polarization and exacerbates mutual distrust within society. It corrodes the public trust that is necessary to republican government, and it undermines the formation of public opinion that is necessary to democratic government.<sup>134</sup>

There are four basic causes of constitutional rot—I call them the Four Horsemen of Constitutional Rot.<sup>135</sup> The first is political polarization. The second is loss of trust in government and, equally important, in one's fellow citizens. The third is increasing economic inequality. The fourth is “policy disasters”—a term coined by Stephen Griffin; it refers to major failures in policy making by our representatives.<sup>136</sup> Recent examples of policy disasters in American history include the Vietnam War, the Iraq War, and the 2008 global financial crisis.<sup>137</sup>

These four horsemen of constitutional rot—polarization, loss of trust, economic inequality, and policy disaster—mutually reinforce each other.<sup>138</sup> Rising economic inequality exacerbates polarization, which encourages tribalism and diverts energies to symbolic conflicts.<sup>139</sup> This makes it easier for politicians supported by wealthy donors to sneak through policies that exacerbate economic inequality. Increasing inequality and polarization, in turn, generate loss of trust. People no

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/U9GM-U9SX]; ALICE MARWICK & REBECCA LEWIS, DATA & SOC'Y RESEARCH INST., MEDIA MANIPULATION AND DISINFORMATION ONLINE (2017), [https://datasociety.net/pubs/oh/DataAndSociety\\_MediaManipulationAndDisinformationOnline.pdf](https://datasociety.net/pubs/oh/DataAndSociety_MediaManipulationAndDisinformationOnline.pdf) [<https://perma.cc/P653-W6AD>].

132. BORN & EDGINGTON, *supra* note 131, at 4; *cf.* JASON STANLEY, HOW PROPAGANDA WORKS 93, 108–09, 120 (2015) (explaining that in democracies, propaganda harms shared ideals of public reason and erodes empathy towards others).

133. Balkin, *Constitutional Rot*, *supra* note 107, at 26 (arguing that successful propaganda enhances motivated reasoning and tribalism); *cf.* STANLEY, *supra* note 132, at 120–26 (explaining that propaganda shuts off rational debate about policy and can be used to undermine empathy for minority groups).

134. Balkin, *Constitutional Rot*, *supra* note 107, at 25 (propaganda undermines trust between citizens and between citizens and officials necessary for democracy to function); STANLEY, *supra* note 132, at 96, 108–09, 120–24 (describing how propaganda undermines the forms of reasoning necessary to democracy).

135. Balkin, *Constitutional Rot*, *supra* note 107, at 22 (describing the “Four Horsemen of Constitutional Rot”).

136. STEPHEN M. GRIFFIN, BROKEN TRUST: DYSFUNCTIONAL GOVERNMENT AND CONSTITUTIONAL REFORM 20 (2015).

137. Balkin, *Constitutional Rot*, *supra* note 107, at 22; GRIFFIN, *supra* note 136, at 20–21.

138. Balkin, *Constitutional Rot*, *supra* note 107, at 22–23.

139. *See, e.g.*, John Voorheis, Nolan McCarty & Boris Shor, Unequal Incomes, Ideology and Gridlock: How Rising Inequality Increases Political Polarization (Aug. 21, 2015) (unpublished manuscript on file with the *Indiana Law Journal*), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2649215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649215) [<https://perma.cc/J8DD-WPWM>].

longer trust government because they feel it does not protect their interests, and because of increasing polarization they lose trust in their fellow citizens, who they believe are stupid, biased, or out to destroy the country. Distrust of government and increasing tribalism makes it easier for wealthy donors to manipulate politics and influence government officials behind the scenes, enhancing tendencies toward oligarchy. Polarization and oligarchy create a government that is unaccountable to more and more citizens, which creates even greater distrust and mutual recrimination. Polarization and unaccountable government also breed overconfidence; they insulate decision makers from necessary criticism, which makes policy disasters more likely; policy disasters, in turn, further undermine trust in government, and so on.

One of the most important policy disasters in recent times has been America's inadequate response to the 2008 financial crisis. The 2008 financial crisis and its aftermath is a special case of the failure of our country's leaders to come to grips with the problem of globalization and how it affects republican government. In the face of globalization, American elites—including its wealthiest and best educated citizens—have taken pretty good care of themselves. But they have not taken good care of the country as a whole.<sup>140</sup>

### *C. The Political Economy of Republican Government*

How does increasing globalization affect the stability of republics? Behind a successful republic is a republican political economy. How the economy operates—and how it distributes its benefits and opportunities—greatly affects how representative government operates. If the structure of the economy changes in certain ways, or changes too quickly, it can undermine the incentives of public officials to pursue the public good and lead to oligarchy or even autocracy. Put another way, although Americans often associate capitalism with democracy—and free markets with free institutions generally—not every version of capitalism can sustain a democratic system of government.

In particular, stable and effective democracies require a broad-based, stable, and economically secure middle class to create the right incentives for government officials to pursue the public good and represent the interests of the broad base of the citizenry.<sup>141</sup> That is because in republics, the people with the most economic power and the greatest wealth will usually attempt to leverage their superior economic power into political power that will allow them to keep their wealth and become even wealthier.<sup>142</sup> Therefore, the middle class is a necessary check on the ambitions of the wealthy. A big, stable middle class can check the wealthy more easily; a small and precarious middle class will find it harder to resist wealth's

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140. Balkin, *Constitutional Rot*, *supra* note 107, at 22.

141. For the most recent version of this argument, which was well known to the Framers, see SITARAMAN, *supra* note 124, at 232–39; Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 TEX. L. REV. 1301, 1320 (2016) (“[T]he founding generation embraced the middle-class-constitutional theory that relative economic equality was necessary for republican government . . .”).

142. SITARAMAN, *supra* note 124, at 11–12; Sitaraman, *supra* note 141, at 1304.

political power. This balance of power is by no means perfect, but it prevents a slide toward oligarchy and preserves republican government.<sup>143</sup>

If economic inequality in a democracy gets too pronounced, the wealthiest will tend, over time, to grab disproportionate political power. They will use that power to further entrench and enrich themselves, reshaping the content of the laws, their interpretation and their enforcement for this purpose. The wealthy can use their economic power to lobby for laws that benefit them and help elect executive officials who will enforce the laws and issue administrative regulations that favor their interests. They can use their wealth to push for the appointment of judges who will interpret the laws and the Constitution in a similar direction. They can also afford the very best legal counsel to represent their interests before courts and administrative agencies. The result is a self-perpetuating cycle: the wealthier you are, the more political influence you have and the more political power you can exercise, the more you can enrich yourself, and the easier it is to use your increased political power and influence to build on previous gains. That is why middle-class entitlements like Social Security and Medicare, organizations like labor unions (which, in this country, have seriously declined), and progressive systems of taxation are important to maintain the republican political economy of modern democracies. They support the stability of the middle class and help it check the political power of capital.

We can trace these ideas about republican politics back to the founding, although the Framers lived in a very different economic world—one dominated by agriculture. Therefore, the mechanisms they would have seen as supporting what we now call the middle class would have been very different from those in a post-industrial economy like our own. At different points in American history, people have made the same basic argument about the effects of concentrated wealth on republican government, although the economic conditions have been very different.<sup>144</sup> In the early years of the Republic, for example, Jeffersonian Republicans supported the idea of an agrarian republic premised on a broad base of self-supporting small farmers.<sup>145</sup> They pressed for the exclusion of primogeniture and slavery in the Northwest Territory.<sup>146</sup> Both slavery and the concentration of land ownership in first-born sons would concentrate wealth in a small number of people and give them economic leverage to gain ever more economic power. This would prevent ordinary Americans from supporting themselves in newly-opening western lands. For similar reasons, Jeffersonians were deeply suspicious of Federalist support for the financial classes, which, they believed, would concentrate wealth, undermine the republic, and produce tendencies toward oligarchy and even monarchy.<sup>147</sup>

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143. SITARAMAN, *supra* note 124, at 5; Sitaraman, *supra* note 141, at 1302.

144. Balkin, *supra* note 110, at 1442.

145. DOUGLASS G. ADAIR, *THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE, AND THE VIRTUOUS FARMER* 50–52 (Mark E. Yellin ed., 2000) (1964).

146. HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* xii, 4, 6–7, 9 (2014); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 498 (2009).

147. *See* ADAIR, *supra* note 145, at 52; WOOD, *supra* note 146, at 151–52; James

Half a century later, the anti-slavery Republican Party—named after Jefferson’s early Republican Party—developed in opposition to an oligarchical system that Republicans called the “Slave Power.”<sup>148</sup> These Republicans saw that a small group of plantation owners controlled vast amounts of property and land and slaves. Slave owners controlled both state governments and the national government; they had successfully leveraged their political power into ever greater economic power and had packed the Supreme Court with their supporters—the most prominent being Chief Justice Roger Taney.<sup>149</sup> Republicans feared that the Slave Power would succeed in spreading slavery—and slaveholders’ economic dominance—throughout the rest of the country.<sup>150</sup>

We face the same issues of republican political economy today in the very different context of the globalized economy of the late twentieth and early twenty-first centuries. A globalized economy threatens republican political economy in three ways. First, it creates opportunities for rapid increases in income going to the very wealthiest individuals, enhancing their comparative political power. Second, it puts pressure on social insurance programs and on the economic stability and self-sufficiency of Americans, weakening their relative political power. Third, it empowers the wealthy to push for ever greater upward redistribution through tax reform, entitlement reform, and deregulation.

In the past several decades, the United States has engaged in an enormous shift of income and risk from the poor and middle class to the wealthiest Americans.<sup>151</sup> One obvious example is the significant reduction of tax rates from where they stood at the end of the New Deal/Civil Rights regime.<sup>152</sup> A less well understood but equally important example is the shift from defined benefit retirement programs, such as employee pensions, to defined contribution programs, such as IRAs and 401(k)s.<sup>153</sup> The former place the risk of economic downturns and bad investment

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Madison, *A Candid State of Parties*, NAT’L GAZETTE, Sept. 22, 1792, at 378 (arguing for a party opposed to monarchism and hereditary privilege, which Madison associated with the Federalist Party).

148. RICHARDSON, *supra* note 146, at 6–7.

149. *Id.* at 13.

150. *Id.* at 6–7; *see also* ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 46–50, 59–60, 63–65, 87–91 (1995) (describing Republican and Free Soil critiques of Southern society, which blamed the expansion of slavery for impoverishing whites who did not own slaves, undermining social mobility, and perpetuating aristocracy); Andrew Shankman, *Introduction: Conflict for a Continent: Land, Labor, and the State in the First American Republic*, in *THE WORLD OF THE REVOLUTIONARY AMERICAN REPUBLIC: LAND, LABOR AND THE CONFLICT FOR A CONTINENT* 1, 17 (Andrew Shankman ed., 2014).

151. *See generally* JACOB S. HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* (rev. & expanded ed. 2008) (describing how Republican policies have enriched business interests and wealthy donors by shifting risks of capitalism onto the poor and middle class).

152. *See U.S. Federal Individual Income Tax Rates History, 1862-2013 (Nominal and Inflation-Adjusted Brackets)*, TAX FOUND. (October 17, 2013), <https://taxfoundation.org/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets> [<https://perma.cc/86V6-3USH>] (showing that top marginal rate for a married couple filing jointly in 1979 was 70%, compared to 39.6% in 2013).

153. HACKER, *supra* note 151, at 118–21.

decisions on employers. The latter place the risk on workers saving for their retirement. On top of this are a vast number of changes in taxation and regulation largely invisible to the general public, but whose cumulative effect is an upward redistribution of wealth and power and a downward distribution of risk and danger.

The long-term result of these changes in political economy has been increasing tendencies towards oligarchy. That is true even though our political system remains formally democratic and there is intense competition between the two major political parties—just as there was, by the way, during the First Gilded Age. Despite the fact that we continue to have regular elections, and the two political parties are deeply polarized, a relatively small number of backers (small that is, in proportion to the mass of the general population) decides who stays in power and what kinds of laws and regulations get enacted.<sup>154</sup> In such a system, most politicians, regardless of their ideological priors, have strong incentives to divert resources to the small group of backers who help keep them in power. The result is predictable: most of the benefits of economic growth have gone to the wealthiest Americans; fiscal and regulatory decisions have diverted a great deal of money that might have been used for public services and public goods to wealthy groups and individuals.<sup>155</sup> Perhaps the most salient recent example of this tendency is the 2017 tax bill, which is likely to achieve a very significant upward redistribution of income from the poor and middle class to the wealthiest Americans.<sup>156</sup>

#### D. Constitutional Rot Produces Demagogues

Increasing constitutional rot has another troubling effect. It tends to encourage the worst kind of politicians: charlatans, snake oil salesmen, and demagogues. Constitutional rot causes the public to understand that their government is corrupt,

154. See MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 77–85 (2014) (arguing that when preferences of low- or middle-income Americans diverge from those of the affluent, there is virtually no relationship between policy outcomes and the desires of less advantaged groups).

155. See JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010) (describing how fiscal and regulatory policies over several decades undermined public goods and services to shift income to wealthier Americans).

156. See, e.g., Facundo Alvaredo, Lucas Chancel, Thomas Piketty, Emmanuel Saez & Gabriel Zucman, *Inequality Is Not Inevitable—but the US ‘Experiment’ Is a Recipe for Divergence*, *GUARDIAN* (Dec. 14, 2017, 1:00 PM), [https://www.theguardian.com/inequality/2017/dec/14/inequality-is-not-inevitable-but-the-us-experiment-is-a-recipe-for-divergence?CMP=share\\_btn\\_tw](https://www.theguardian.com/inequality/2017/dec/14/inequality-is-not-inevitable-but-the-us-experiment-is-a-recipe-for-divergence?CMP=share_btn_tw) [<https://perma.cc/83FR-5CQT>] (“The tax bill . . . will turbocharge inequality in America. Presented as a tax cut for workers and job-creating entrepreneurs, it is instead a giant cut for those with capital and inherited wealth. It’s a bill that rewards the past, not the future.”); John Cassidy, *The Final G.O.P. Tax Bill Is a Recipe for Even More Inequality*, *NEW YORKER* (Dec. 14, 2017), <https://www.newyorker.com/news/columnists/the-final-gop-tax-bill-is-a-recipe-for-even-more-inequality> [<https://perma.cc/TGF8-FTEC>] (“As virtually every independent study has shown, the G.O.P. plan showers most of its goodies (tax cuts) on the richest people in the country while doing little for poor and middle-income households.”).

and that their leaders can't be trusted. And so they turn to other leaders who tell them that they have been badly used, and who offer to wash away the corruption.

Traditionally, demagogues are people who affect a common, rough-hewn, folksy, even ill-mannered style, whether or not they are actually from humble origins.<sup>157</sup> Demagogues identify themselves with the common person. They flatter the public,<sup>158</sup> telling them that they have been misunderstood; that snobbish elites look down on them and are laughing at them; and that the demagogue understands how they have been mocked, neglected, and disparaged.

But demagogues usually do more than this. They also usually employ highly emotionally charged rhetoric. This rhetoric divides the public into the noble, wise, and honest common people—the real members of the country—and a group of immoral and deviant others—elites, foreigners, or minorities—who are not of the people and are the real source of the country's problems.<sup>159</sup> Demagogues appeal to prejudice and minister to fear.<sup>160</sup> Demagogues, in short, look for scapegoats; they look for opportunities to divide, frighten, and anger the public, and thereby forge a powerful emotional connection with their followers. They use their divisive rhetoric—and their emotional connection to their rapt followers—to gain power, and to justify violating political norms and the law.<sup>161</sup>

Demagogues praise the morality and decency of common people, whom they sharply distinguish from those hated others who lack the same morality, decency, and genuine connection to the country and its traditions. They denounce the

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157. Michael Signer lists four characteristic features of demagogues: (1) they fashion themselves as a man or woman of the common people, as opposed to the elites; (2) their politics depends on a powerful, visceral connection with the people that dramatically transcends ordinary political popularity; (3) they manipulate this connection, and the raging popularity it affords, for their own benefit and ambition; and (4) they threaten or outright break established rules of conduct, institutions, and even the law. MICHAEL SIGNER, *DEMAGOGUE: THE FIGHT TO SAVE DEMOCRACY FROM ITS WORST ENEMIES* 35 (2009).

158. CEASER, *supra* note 126, at 320 (describing “soft” demagogues as those who flatter the public); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 28 (1987) (same); *see also* ARISTOTLE, *POLITICS* bk. V, at 463 [1313b] (Harris Rackam trans., Loeb Classical Library ed. 1932) (“[T]he demagogue is the flatterer of the people . . .”); JAMES FENIMORE COOPER, *THE AMERICAN DEMOCRAT* 120–28 (Liberty Classics 1981) (1838) (explaining that demagogues flatter the people in order to lead them); *id.* at 121 (“The peculiar office of a demagogue is to advance his own interests, by affecting a deep devotion to the interests of the people.”).

159. *See* CEASER, *supra* note 126, at 57, 194 (noting that “hard demagogues” emphasize emotional appeals and divisive rhetoric); COOPER, *supra* note 158, at 122–23 (“The demagogue is . . . a detractor of others . . . [who] appeals to passions and prejudices rather than to reason, and is in all respects, a man of intrigue and deception, of sly cunning and management . . .”); *cf.* ARISTOTLE, *supra* note 158, at 439 [1310b] (“For almost the greatest number of tyrants have risen, it may be said, from being demagogues, having won the people’s confidence by slandering the notables.”).

160. TULIS, *supra* note 158, at 29 (“The hard demagogue attempts to create or encourage divisions among the people in order to build and maintain his constituency. Typically, this sort of appeal employs extremist rhetoric that ministers to fear.”).

161. SIGNER, *supra* note 157, at 35.

country's cultural decline. They promise to restore the people to their lost greatness. They promise, to borrow a phrase, to make the country great again.<sup>162</sup>

Demagogues promise to make everything right, to sweep away the corruption, to restore order and decency. Demagogues tell us that they have special abilities, special skills that other leaders lack. They have the political will to succeed where others have failed. They alone can fix it.

Very often people are not hoodwinked by demagogues. They see them coming from a long way off. They know that these leaders are unscrupulous, that they exaggerate, even that they lie. Many people know, in short, that these leaders are demagogues. But because of years of constitutional rot, the public has become so frustrated—with government, with their current leaders, and even with their fellow citizens—that they are willing to take a chance on a demagogue. They are willing to roll the dice, to blow everything up, on the chance that the demagogue can clean up the mess of politics, on the chance that things can get better.<sup>163</sup>

All of which brings me to our current situation. In my view, Donald Trump is a symptom of constitutional rot, and not its cause. He has not created our present misfortunes. But, like many unscrupulous politicians, he has taken advantage of them, and in many ways he is making them worse.

I won't mince words. Donald Trump is a demagogue. I don't know if our current President has ever read anything about the history of demagogues, but I do know that he likes to hire people who look the part—people who, as they say, come straight out of central casting. And I can say with some confidence that Donald Trump perfectly fits the role of a demagogue—he looks and acts as if he came straight out of central casting.

Trump, to be sure, is not a man of the common people, but he acts like one; he is by turns uncouth, ill-mannered, boorish, corrupt, cunning, and entertaining. He offered himself as a sort of “people's billionaire,” a persona he honed in his years as a reality television star. He affects a pose of bluntness, plain-spokenness, and honesty, even when he is obviously lying. He blames globalists and elites for demeaning and harming ordinary people. He warns against conspiratorial forces arrayed against him and the public. He engages in race baiting, he stokes fear of immigrants, he raises the specter of crime and loss of social order, and he finds ever new ways to divide and anger the public.<sup>164</sup>

162. See, e.g., THE FEDERALIST No. 1 (Alexander Hamilton) (“[O]f those men who have overturned the liberty of republics, the greatest number have begun their career by paying an obsequious court to the people, commencing demagogues and ending tyrants.”); STAN VAN HOOFT, HOPE (THE ART OF LIVING) 96 (2014) (“Promising to save their people from oppression and exploitation, to bring an end to their humiliation and defeats, to restore the dignity and power of their race . . . has always been the modus operandi of fascist demagogues and populist rabble-rousers.”).

163. See, e.g., Jim Ruth, *I Hate Donald Trump. But He Might Get My Vote*, WASH. POST (June 28, 2016), [https://www.washingtonpost.com/opinions/i-hate-donald-trump-but-he-might-get-my-vote/2016/06/28/ddeee5f8-398d-11e6-9ccd-d6005beac8b3\\_story.html?utm\\_term=.ae4080e3d8eb](https://www.washingtonpost.com/opinions/i-hate-donald-trump-but-he-might-get-my-vote/2016/06/28/ddeee5f8-398d-11e6-9ccd-d6005beac8b3_story.html?utm_term=.ae4080e3d8eb) [<https://perma.cc/YE35-KT6M>].

164. See Molly Ball, *Donald Trump and the Politics of Fear*, ATLANTIC (Sept. 2, 2016), <https://www.theatlantic.com/politics/archive/2016/09/donald-trump-and-the-politics-of-fear/498116> [<https://perma.cc/2429-XEMT>] (explaining how Trump generates fear of



Like many demagogues, Trump also is the master of projection and chutzpah. He says that he will “drain the swamp”<sup>165</sup> and eliminate corruption when he is probably the most corrupt person who has run for the Presidency in my lifetime. He says that he will stick up for ordinary people who have been humiliated and laughed at by elites when he is doing everything he can to benefit the wealthiest and line his own pockets.<sup>166</sup> He is utterly without shame, a moral and political hypocrite who systematically attributes his own failings to others.

It is almost as if he read a book on how to be a demagogue—“Demagogues for Dummies”—and systematically went through each chapter, checking off each characteristic move and performing them flawlessly. I cannot say whether he studied up on the role or whether he simply has amazing instincts and natural talents for demagoguery. In any case, as America descended into ever greater depths of constitutional rot, Trump appeared, as if on cue: descending down the escalator of his gold-plated skyscraper to take advantage of the people of this country, just as he had taken advantage of so many other people before in his checkered business career.<sup>167</sup> It is as if someone called up Domino’s Pizza and said, “I’d like to order a large demagogue to go, with extra cheesiness and bile.”

Trump’s opponents misunderstand the basis of his appeal. They comfort themselves with the belief that he will not be able to keep his con game going forever. His administration is a mess, his executive branch is woefully

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immigrants, crime, and loss of social order); Jonathan Tilove, *The Rhetorical Brilliance of Donald Trump, Demagogue for President*, STATESMAN: FIRST READING (Nov. 23, 2016), <http://politics.blog.mystatesman.com/2016/11/23/the-rhetorical-genius-of-donald-trump-demagogue-for-president> [<https://perma.cc/GC4G-5H9U>] (describing Trump’s rhetorical techniques).

165. Trevor Hughes, *Trump Calls to ‘Drain the Swamp’ of Washington*, USA TODAY (Oct. 18, 2016, 5:17 PM), <https://www.usatoday.com/story/news/politics/elections/2016/2016/10/18/donald-trump-rally-colorado-springs-ethics-lobbying-limitations/92377656> [<https://perma.cc/ZE64-K85L>].

166. Kate Brannen, *Trump Family’s Endless Conflicts of Interest: Chapter and Verse*, NEWSWEEK (July 3, 2017), <http://www.newsweek.com/trump-family-s-endless-conflicts-interest-chapter-and-verse-631216> [<https://perma.cc/6T3S-M4CG>] (offering a list of a examples “of the vast number of issues that require oversight and scrutiny during this presidency”); Joy Crane & Nick Tabor, *501 Days in Swampland*, N.Y. MAG.: DAILY INTELLIGENCER (Apr. 2, 2018), <http://nymag.com/daily/intelligencer/2018/04/trump-and-co-are-stealing-america-blind-timeline.html> [<https://perma.cc/JAH5-5VVU>] (“More than at any time in history, the President of the United States is actively using the power and prestige of his office to line his own pockets . . . there has proved to be no public policy too big, and no private opportunity too crass, to exploit for personal profit.”); *How Donald Trump Is Monetising His Presidency*, ECONOMIST (July 20, 2017), <https://www.economist.com/news/business/21725303-six-months-mr-trumps-conflicts-interest-look-even-worse-how-donald-trump-monetising> [<https://perma.cc/6D5T-EKJC>] (“Mr. Trump already appears to be monetising the presidency.”); Jeremy Venook, *Trump’s Interests vs. America’s*, *Dubai Edition*, ATLANTIC (Aug. 9, 2017), <https://www.theatlantic.com/business/archive/2017/08/donald-trump-conflicts-of-interests/508382> [<https://perma.cc/22JB-4JD3>] (offering “an attempt to catalogue the more clear-cut examples of conflicts of interest that have emerged so far”).

167. See, e.g., Alexandra Berzon, *Donald Trump’s Business Plan Left a Trail of Unpaid Bills*, WALL ST. J. (June 9, 2016, 4:52 PM), <https://www.wsj.com/articles/donald-trumps-business-plan-left-a-trail-of-unpaid-bills-1465504454> [<https://perma.cc/ZP6W-E6D6>].

understaffed, his backstabbing underlings leak like sieves, the country is perpetually in an uproar, and he lurches daily from scandal to scandal.<sup>168</sup> Surely, his opponents tell themselves, a President who has been exposed over and over again as a fraud, a liar, a cheat, and a scoundrel can't keep power for long. Surely his presidency is going to fall apart at the seams any day now.

Yet this is how demagogues operate. Demagogues gain and keep power by creating and sustaining negative emotions of fear, anxiety, upset, and suspense. They thrive on emotional upheaval and a sense of unresolved crisis; they maintain power by keeping people worried and uncertain. If you are perpetually upset and anxious about American politics, if you distrust and even hate the other half of this country, the demagogue's strategy is working. Polarization binds his followers more closely to him and frustrates and paralyzes his opponents. Emotional upheaval is the friend of the demagogue. Crisis is his brand.

Moreover, Trump is no ordinary demagogue. He is a twenty-first century innovator, a Michelangelo of political chutzpah. This particular demagogue has mastered the arts of the tabloid press and the narrative techniques of reality television. He understands that in the early twenty-first century politics can be represented and rearranged as a series of episodes in a reality television series, in which he is both the producer and the star—an addicting series of episodes in which the various participants are shocked, outraged, and wondering whatever will happen next. Reality television deals in anger, emotional excess, and a compelling narrative of heroes and villains, scandals and blowups, delicious secrets, and surprise revelations. Trump has created a new form of political demagoguery that corresponds to the rhythm of reality television, one that keeps the media transfixed, entertains his supporters, and exhausts his opponents.

## VI. THE BAD NEWS—AND THE GOOD NEWS

That's the bad news. Here is the good news.

This is not the first time that the American political system has faced similar challenges. To be sure, it is the first time that all of the cycles I have described have lined up in this particular way. But it is not the first time that we have experienced the anxiety of an exhausted political regime and a gradual transition to a new one. It is not the first time we have experienced a cycle of polarization and depolarization. And, above all, it is not the first time that we have been through a cycle of constitutional rot and renewal.

Our current situation most resembles the Gilded Age, or what I would call the First Gilded Age, because I believe we are now in America's Second Gilded Age.

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168. See, e.g., Jordan Fabian, *Leaks Continue to Plague Trump White House Despite Crackdown*, HILL (June 9, 2018, 9:00 AM), <http://thehill.com/homenews/administration/391430-leaks-plague-trump-white-house-with-no-end-in-sight> [https://perma.cc/VVA8-9KPB]; Mark Hay, *Trump's Failure to Hire People Is Doing Serious Damage*, VICE (June 7, 2018, 6:17 AM), [https://www.vice.com/en\\_us/article/d3kwww/trump-administration-understaffing-crisis](https://www.vice.com/en_us/article/d3kwww/trump-administration-understaffing-crisis) [https://perma.cc/8TVQ-S6RY]; Matthew Yglesias, *Trump's Administration Can't Clean House Because Its Leader Is Too Soaked in Scandal*, VOX (July 11, 2018, 1:10 PM), <https://www.vox.com/policy-and-politics/2018/7/11/17546970/trump-pruitt-shine> [https://perma.cc/MK5P-G3RT].

As I describe it, you will see some of the parallels, and why I think it is a period with many similarities to our own.

The Gilded Age runs from around the middle of the 1870s to the beginning of the twentieth century.<sup>169</sup> It is a period of rapid technological progress and enormous economic growth.<sup>170</sup> It is a period in which a small number of people make huge fortunes, and hence it is also a period of increasing inequalities of wealth, which are leveraged into political power—and political corruption.<sup>171</sup> The new fortunes of the Gilded Age generate a great deal of corruption, so much so that government is effectively for sale, and people believe that senators and cabinet officials are effectively in the pay of the trusts.<sup>172</sup>

The Gilded Age is also a period of great waves of immigration from around the world, changing people's ideas about what it means to be an American.<sup>173</sup> For the same reason, it is also a period of increasing nativism, racism, social unrest, violence, and rioting.<sup>174</sup> It is the period in which many of the achievements of racial equality in the First Reconstruction are eventually blunted and white supremacy is resurgent. The beginnings of Jim Crow and black disenfranchisement occur near the end of the Gilded Age, symbolized by the Supreme Court's blessing of Jim Crow in *Plessy v. Ferguson* in 1896,<sup>175</sup> and its refusal to do anything about black disenfranchisement in 1903 in *Giles v. Harris*.<sup>176</sup> It is a period of severe political polarization between Democrats, the party of the South, Jim Crow and white supremacy, and Republicans, who repeatedly wave the bloody shirt and label the Democrats the party of Rum, Romanism, and Rebellion. The Gilded Age is also a period of resurgent populism—the People's Party forms during this period—and it is also a period of populist demagogues.

If you had been living in the First Gilded Age, you might well have looked around you—at the increasing economic inequality, the corruption, the influence peddling, the effective control of government by the wealthy, the demagoguery, the racism, the social unrest, and the violence—and wondered whether American democracy could or would survive.

And yet it did survive. The First Gilded Age gives way to the Progressive Era, a period of extensive reforms at local, state, and national levels, four constitutional

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169. For a standard history of the Gilded Age, see WHITE, *supra* note 65.

170. *Id.* at 3 (describing “a country transformed by immigration, urbanization, environmental crisis, political stalemate, new technologies, the creation of powerful corporations, income inequality, failures of governance, mounting class conflict, and increasing social, cultural, and religious diversity”).

171. *Id.* at 2.

172. A famous Joseph Keppler cartoon from 1889 shows the trusts portrayed as huge bags of money looming over tiny senators ready to do their bidding. See *The Bosses of the Senate*, U.S. SENATE, [https://www.senate.gov/artandhistory/art/artifact/Ga\\_Cartoon/Ga\\_cartoon\\_38\\_00392.htm](https://www.senate.gov/artandhistory/art/artifact/Ga_Cartoon/Ga_cartoon_38_00392.htm) [<https://perma.cc/DD4U-38U2>].

173. WHITE, *supra* note 65, at 3–5.

174. *Id.*

175. 163 U.S. 537 (1896) (upholding separate but equal facilities on railway carriages).

176. 189 U.S. 475 (1903) (refusing to intervene in Alabama's scheme for disenfranchisement of African-Americans).

amendments, and eventually to the New Deal.<sup>177</sup> By the first decade of the twentieth century, there are progressive wings promoting government reform in both major political parties. American democracy bottoms out of its cycle of rot and begins a long process of democratic renewal and government reform. There are a series of mobilizations for good government, for public health, for workers' rights, for women's rights—and many far less savory mobilizations too. Political polarization eventually declines as well.<sup>178</sup>

Of course, things will not happen in exactly the same way they did before. But my point is that constitutional rot, like polarization, does not have to get worse and worse. I not only believe that we can bottom out from a period of constitutional rot and experience a period of constitutional renewal, I know that it has happened before. Just as the First Gilded Age gave way to a Progressive Era, it is possible for this, our Second Gilded Age, to give way to a Second Progressive Era, a period of reform and renewal addressing the urgent problems of our own time.

Our politics is the result of a series of overlapping cycles, which together have produced our political world. From this larger perspective, the emergence of a successful demagogue like Trump is a genuine problem for American democracy; yet it is merely a symptom of a much larger set of problems that festered long before he ran for President. Trump was only able to rise to power because the Reagan coalition is aging and falling apart, because his party's political strategies have contributed to increasing polarization and distrust among fellow citizens, and because the regime's commitments to policies that produce economic inequality have contributed to increasing constitutional rot. To be sure, President Trump is doing his best to exacerbate both the polarization and the rot. But even if tomorrow President Trump resigned from office, or was impeached and removed, and replaced by his Vice President—a solid son of Indiana—the new President and the party he leads would face the same problems.

The Reagan regime is crumbling. It will eventually fall away, replaced by a new regime, probably in five to ten years. It is possible, perhaps even likely, that the Democrats will be the dominant party in this new regime. According to this possible future, this regime will feature a new dominant coalition that will build on and further develop Barack Obama's 2008 and 2012 "coalition of the ascendant." Although insufficient in 2016—and perhaps even in 2020—that emerging coalition of voters will grow comparatively stronger, as parts of the older Reagan coalition age and die, as newer, younger voters emerge to replace them, and as educated professionals, women, and other whites defect to the Democratic Party. It is also possible that a third party will emerge, like the Republicans in the 1850s, to become the dominant party; but this is more difficult to achieve in the twenty-first century than it was in the nineteenth, and the Democrats, unlike the Whigs in the 1850s, do not seem ripe for dissolution.

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177. For a brief introduction to the Progressive Era, see *Maureen A. Flanagan, Progressives and Progressivism in an Era of Reform*, OXFORD RESEARCH ENCYCLOPEDIA OF AM. HIST. (2016), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-84> [https://perma.cc/JNP6-4VWH].

178. See Balkin, *supra* note 11, at 1189–90 (explaining that political polarization in Congress begins to decline in the first years of the twentieth century, bottoming out during the New Deal).

The other possibility is that the Republican Party—or perhaps a breakaway faction of the party—will reform itself, regroup, form a national majority, and extend the Reagan regime. Such a party would probably be different in important respects from Reagan’s party, with a different coalition and a different set of agendas and concerns. There is a historical precedent for this too. In the 1890s it looked as if the Democratic Party, allied with a populist insurgency, might make a breakthrough. But Democrats had the misfortune to control the White House during the panic of 1894.<sup>179</sup> William McKinley defeated William Jennings Bryan in the 1896 election, reorganizing the Republican Party and American politics around a new set of issues.<sup>180</sup> The reinvigorated Republican Party then continued to dominate American politics until the New Deal.

This scenario is the strongest argument for seeing Trump as an affiliated rather than as a disjunctive President. He would play the same structural role as McKinley, providing a necessary course correction to keep Republicans dominant for a generation or more.

I don’t see Trump as the new McKinley, for two reasons. First, reviving the Republican regime in our current political chaos would require great vision and strategic acumen. Although Trump has proven himself to be a great tactician, he seems too undisciplined, too driven by impulse and personal gain to effect such a transformation. Second, the most likely reformation of Republicanism—as a nativist, populist party organized around the South and rural America—will more resemble Bryan’s 1896 populist coalition than McKinley’s reformed coalition of businesses, city workers, and African-Americans. It is not clear that one can cobble a durable majority out of the segments of the American public that are growing older and losing population. To be sure, Trump has defied predictions and expectations many times before. Even so, Trump seems to represent a dead end for the party—the last President in the Reagan regime rather than the founder of an American conservative revival.

Whatever happens, the agendas of politics ten years in the future are likely to look very different from the politics that we are suffering through now. That is the message with which I will leave you: constitutional development doesn’t move in straight lines. It goes in cycles. And there are multiple cycles at work. There is a cycle of constitutional rot and renewal. There is a cycle of polarization and depolarization. And there is the cycle of the rise and fall of political regimes.

When all of these cycles line up in a particularly unhappy way, the country moves into political darkness, an eclipse of democracy. But just like the eclipse on August 21, 2017, the darkness does not last forever. In fact, it lasts only a few minutes in the larger scheme of things. You may not see that now, but I promise you, this eclipse is purely temporary.

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179. GERARD N. MAGLIOCCA, *THE TRAGEDY OF WILLIAM JENNINGS BRYAN: CONSTITUTIONAL LAW AND THE POLITICS OF BACKLASH* 2–5 (2014); Polsky, *supra* note 22, at 64–65.

180. *See generally* R. HAL WILLIAMS, *REALIGNING AMERICA: MCKINLEY, BRYAN, AND THE REMARKABLE ELECTION OF 1896* (2010).